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No. 481

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 13756.

VIKING THEATRE CORPORATION,

Appellant,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

JOINT APPENDIX.

Volume III (Pages 915a to 1398a).

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SEVENTEENTH DAY

* * *

(2643)

JAY WREN, resumed.

CROSS-EXAMINATION (Continued)

By Mr. Ward:

Q. Before I return to the subject with which we were concerned at the conclusion of yesterday's session, I would first like to ask you whether during the course of your duties as manager of the Viking Theatre you or Mr. Sley or the Viking Theatre subscribed to any trade periodicals in connection with the motion picture industry?

A. Oh, yes.

(2644)

Q. And what publications did you subscribe to?

A. "Box Office," "Exhibitor," and we got "Variety" every week from the newsstand across the street.

Q. Now—

A. And—pardon me—"Motion Picture Daily."

Q. That make about four?

A. Yes, sir.

Q. And those periodicals, are they weekly?

A. Well, the "Motion Picture Daily" is what the title indicates; it is a daily.

Q. Yes.

A. The "Exhibitor" is a weekly magazine and "Box Office" is a weekly and "Variety" is a weekly.

Q. And a thorough and interested reading of those periodicals would give a pretty comprehensive review of what was going on in the nature of developments in the exhibition business, wouldn't it, Mr. Wren?

A. Yes, sir.

Q. That is why you subscribe to them?

A. Yes, sir.

Q. Did you read them regularly?

A. As often as possible, yes, sir.

Q. I show you this magazine, Mr. Wren, bearing the heading "Exhibitor" and ask you to tell His Honor and the members of

(2645)

the jury whether that is a copy of the "Exhibitor," a sample copy, may we say, of the "Exhibitor" that you received weekly during the period of this suit while you were manager of the Viking?

A. I would say it was, sir.

Q. And that you say was a weekly publication?

A. Yes, sir.

Q. And that is published locally, isn't it, by Mr. J. E. Manuel here in Philadelphia?

A. I believe it is published out of town but their offices are here. I believe their offices are in Kansas City.

Q. It is a fact, is it not, that each week there appears in that publication the release of motion picture films by each of the motion picture distributors and not only those who are involved in this case, but also other distributors of motion pictures; isn't that so?

A. It is a special supplement, sir.

Q. And you can determine from that special supplement as you have described it each week the films that are being released or about to be released or as to which future release is contemplated from week to week; isn't that correct?

A. Well, you see, they have changed this, sir. They don't have this. There is a supplement. I think it was just a couple months after that. They have an insert now, a yellow

(2646)

insert, that gives you the breakdown. It isn't in the same type or manner. It is listed by distributors and they might have "March" and list four or five pictures, if you understand what I mean, but there is never any availability dates.

Q. Now, what you are referring to now is the inside of the back cover?

A. Yes, sir.

Q. Of the sample issue of the "Exhibitor" that I have shown you which indicates releases by name of picture and the month of release by the several motion picture distributors; isn't that correct?

A. Yes, sir.

Q. And then you say thereafter, shortly thereafter, that system was changed and in its place there was substituted an arrangement by which there was an insert each week placed in the volume itself which you could remove and study if you wanted to?

A. Two different types, sir, one covering the reviews and one covering general releases.

Q. Yes, and in addition, if you will just let me have that a moment—

A. Surely.

Q. —in addition to the release schedule which appears here, does it not, as I am now showing it to you—

(2647)

A. Yes, sir.

Q. —this which is captioned "The National Release Date Guide"?

A. Yes, sir.

Q. That is correct, isn't it?

A. Yes.

Q. In addition to that, the motion picture distributors from time to time and on a weekly basis advertised the mo-

tion pictures that they were about to release for exhibition, did they not?

A. Yes, sir.

Q. Let me show you, for example, this two-page spread and ask you whether, for example, that is not an advertisement by Twentieth Century-Fox for the production THE RAINS OF RANCHIPUR?

A. Right, sir.

Q. And just one more and then I will pass to something else.

Well, perhaps what I am looking for is in another volume, but, for example, here is on advertising the release of the picture THE DESPERATE HOURS.

A. Right, sir.

Q. The Paramount production involving Humphrey Bogart, Frederick March and others; is that correct?

A. Yes.

(2648)

Q. So in addition to the release schedule, you had access through this publication and the others that you have mentioned to the advertisements inserted by the several distributors to inform you with regard to the motion pictures being released and this is on a weekly basis; correct?

A. Yes, sir.

Mr. Ward: Will you mark this, please, Mr. Reporter?

(November 9, 1955 issue of "The Exhibitor" was marked Defendants' Exhibit 76 for identification.)

By Mr. Ward:

Q. Have you still before you Exhibit D-75, I believe?

A. Yes, sir.

Q. NOT AS A STRANGER?

A. Yes, sir.

Q. Now, I would like to ask you a few more questions about that.

This is by way of transition, Your Honor, not intended to be repetitious.

You recognize that United Artists was acting with respect to this picture NOT AS A STRANGER in connection with the release of the film by Stanley Kramer, the producer, do you not, sir?

A. Yes, sir.

(2649)

Q. And you were also aware of the fact that Stanley Kramer, the producer, had to approve any license agreement with respect to the exhibition of this film at your theatre or any other theatre; correct?

A. As you indicated, sir, it is George Shaeffer on here.

Q. Well, my statement is correct?

A. Yes.

Q. And, therefore, you recognized when you made a bid application for this picture that United Artists did not have the exclusive and final say with regard to the licensing of the film; correct?

A. Right, sir.

Q. Now, yesterday when we adjourned, we had reached the second page of this document which is headed, if you will turn to it, and correct me if I don't read it accurately, "Operating Expense Rider Attached to and Made a Part of the Special Exploitation Engagement." Do you see the language I am reading there?

A. Yes, sir.

Q. And is it not a fact that at the very outset of this operating expense rider which bears your signature as you testified yesterday—and this is dated May 2, 1955—the following language appears, and I am quoting it:

(2650)

"Exhibitor"—that is you—

A. Yes, sir.

Q. "—represents that the following is a correct itemized statement of the average weekly operating expenses of the theatre for the 52 weeks immediately preceding the date hereof. Distributor relies on the accuracy of said statement in entering into the license agreement attached hereto of which this rider forms a part. We will not reveal any information regarding your expense which is submitted on the printed form of operating expense rider."

Now, that is the end of the quotation. Have I read it correctly?

A. Yes, sir.

Q. There then follows in this operating expense rider a detailed statement of various categories of theatre operating expense; is that not so?

A. Yes, sir.

Q. And the first item is "Theatre Payroll" under which there has been typed by typewriter "Average Weekly Payroll, $2,132.08"; is that correct?

A. Yes, sir.

Q. The next item under the same category is "Overtime."

A. Yes, sir.

(2651)

Q. "$57"?

A. Right, sir.

Q. Now, all these items that I am reading purport to be the average weekly cost to the Viking Theatre of these items that I mentioned; is that correct?

A. Yes, sir.

Q. Let us come to the next heading which is called "Repairs and Maintenance Other Than Capital Items," and that item, the details of which I will refer to in a moment, come to $149.58; correct?

A. Yes, sir.

Q. Now, that $149.58 item purports to cover the following items as appear by typewriting in the body of this operating expense rider: "Service"—

A. "Sound Service," sir.

Q. I beg your pardon, "Sound Service."

"ASCAP," A-S-C-A-P; will you describe for the Court and jury the meaning of those initials.

A. American Society of Composers, Authors and Publishers. That is for a license for the right to use any canned music of any description.

(2652)

Q. Rubbish removal, uniforms and maintenance, seat repairs, painting, hardware, booth and stage repairs, plumbing, automatic door maintenance, exterminator, filter—

A. Cleaning.

Q. —cleaning?

A. Yes, sir.

Q. I think that concludes the detail of the items of repairs and maintenance, correct?

A. $149,58, yes, sir.

Q. The next item on this same document to which I have referred, amounting to $289, includes these items under the category of Supplies, does it not?

A. Yes, sir.

Q. Light bulbs, neon tubing, janitor and lavatory supplies, carbons and fuses, commercial artists and materials, tickets, office supplies, flashlights, batteries, bulbs, photostats, printing, etc., $289?

A. Yes, sir.

Q. Then you come to the next item, heating and cooling, which embraces, according to the statement—correct me if I fail to read it properly—steam, water and sewer rent, electric and freon—that is the material you use for your air conditioner, isn't it?

A. Yes, sir.

(2653)

Q. That amounts to $269.46, right?

A. Right, sir.

Q. Then under the heading Other Expenses, followed by the parenthetical word "Itemized," appears the following items: Legal and auditing, license fees, sign permits, incidentals, depreciation, telephones, telegraph, postage, $357.22.

A. Yes, sir.

Q. The next item is film transportation. I suppose that means the cost of actually moving films back and forth between your theatre and the various film exchanges of the distributors.

A. Right, sir.

Q. $11.40.

A. Right, sir.

Q. Next the heading is Rent Paid to Others Not Affiliated With Exhibitor, $1500, is that right?

A. Yes, sir.

Q. Was that a correct statement, by the way?

The Markette Corporation was the owner of this theatre, wasn't it?

A. That is right, sir.

Q. The Markette Corporation leased the theatre to the Viking Theatre Corporation?

A. Right, sir.

(2654)

Q. Mr. Sley owns both corporations?

A. I don't know about Markette, sir.

Q. You don't?

A. I know he does own the Viking.

Q. Don't you know that he owns the Markette Corporation?

A. Well, certainly, but I mean I couldn't state as an actual fact who is on the board there or anything else.

Q. I am not asking you who is on the board, isn't it a fact that Mr. Harry Sley is the owner of both the Viking Theatre and the Markette Corporation, both the landlord and the tenant?

A. I only know about the Viking, sir, and I know that Markette is the landlord.

Q. And don't you know that Mr. Sley owns the Markette Corporation? Haven't you already testified to that?

A. I believe he does. One of the principal stockholders. Yes, sir.

Q. So that there is, quite apart from the technical details of ownership—the two corporations are affiliated, aren't they?

A. That I wouldn't know, sir.

Q. You wouldn't know?

Did you make any inquiry to determine whether or not Markette Corporation was affiliated with the Viking

(2655)

Theatre, when you inserted this $1500 figure in answer to the question: "Rent Paid to Others Not Affiliated With Exhibitors"?

A. No, sir, I didn't.

Q. We come down to the next item as to which a figure appears Taxes, and then the parenthetical clause, excluding all taxes based on gross or net income, and then appears in typing Payroll Tax $109.45; correct?

A. Yes, sir.

Q. And then the last item is Insurance $95?

A. Right, sir.

Q. And that makes the grand total which is identified and described here as Total Average Weekly Operating Expenses, $4,970.19.

A. Yes, sir.

Q. Now, these figures that I have just referred to in this operating statement constitute an attempt by you to comply faithfully with the requirements of this operating expense rider, do they not?

A. Yes, sir.

Q. You undertook to represent to United Artists these figures with respect to these several categories of expense to the penny, is that right?

A. Yes, sir.

(2656)

Q. And under the terms of your bid which you have already referred to as a 90/10 offer over house expense of $4,970.19, you knew when you submitted this offer to United Artists Corporation that out of the gross receipts that you got at your theatre for the exhibition of this picture, if you were the successful bidder, the very first money to come off the top would be the $4,970.19, didn't you?

A. Not according to the rider, sir.

Q. I am not talking now about the rider. Isn't it a fact that on this bid that you made, and if your bid had been accepted, as it was—isn't it a fact that after a week's performance went by you as the manager of the Viking Theatre would have to take off the top of your gross receipts $4,970.19?

A. That is right.

• • •

(2657)

Q. So that my statement is correct, then, is it not, Mr. Wren, that each week during the exhibition of NOT AS A STRANGER at your theatre the very first application of the money received at your boxoffice was to the payment to the Viking of $4,970.19; is that correct?

A. Correct.

Q. And to the extent that any of the figures in this operating expense rider were overstated that would mean clear profit to the Viking, wouldn't it?

A. Yes, sir.

Q. When you had this application before you and when it was in course of preparation you had a sense of responsibility, I take it, with respect to the accuracy of the figures that were to be included in this operating statement, did you not?

A. I think I have said, Mr. Ward, that these are a projection of estimates given to me by Mr. London, who

was the office manager, and also I think there is another important thing here, the Viking Theatre at such time had not been opened 52 weeks.

Q. I understand that.

A. So it had to be estimated.

Q. Well, let us find out about that.

(2658)

These figures I have just read off were based upon an average weekly result of your first 13 weeks of operation, isn't that so?

A. I would assume they took it from some figures of that type or description. It might have been the first 26 weeks.

Q. You don't know?

A. I don't know, sir.

Q. Did you try to find out at the time?

A. No, sir. I asked him for the averages on this thing, and this is the information that he supplied me, and it is the information that I incorporated in the rider, sir.

Q. You asked him for the averages, didn't you?

A. Yes, sir.

Q. And you accepted what he gave you and put it in here?

A. Yes, sir.

Q. So it was not, as you said a moment ago, a projected estimate given to you by Mr. London, was it?

A. Well, it was to a degree, sir. The only way he could do was tell me, we had to estimate this, and that, and the other, and here is what you can put in there.

Q. That is what he told you?

A. Yes, sir.

Q. And he called it an estimate, did you?

A. He certainly did, sir. I read this to him over the

(2659)

telephone.

Q. When it comes out to odd pennies you insist that it was an estimate?

A. Well, sir, I could only rely on the information supplied by—now, the fact that the payrolls would come out to $2132.08, I don't see anything odd about that, sir.

Q. Well, it was important to you, wasn't it, Mr. Wren, to have these figures accurate?

A. It was, sir.

Q. And what were the circumstances under which you got these figures? Tell us about that. Did you talk to Mr. Sley about it, first of all?

A. I discussed it with Mr. London, first of all.

Q. Did you discuss it at any time with Mr. Sley?

A. Only when the bid was being put in.

Q. After this had been prepared?

A. Yes, sir, after the cash guarantee and this.

Q. Did you show it to Mr. Sley?

A. No, I don't recall having shown him the rider, sir. I just showed him the deal that we had proposed, that we were proposing.

Q. Did you tell Mr. Sley about it?

A. Tell him about the deal? I certainly did, sir.

Q. And did you tell him about the $4,970.19 as house expense

(2660)

that you were including?

A. That was the figure we were using, yes, sir.

Q. Pardon?

A. That was the figure we were using, yes.

Q. Well, apart from whether you were using it, did you tell Mr. Sley about it?

A. The breakdown of these items?

Q. Of the amount.

A. I told him the amount. I said I did, sir.

Q. So that you told him the amount of your bid and the terms of your bid and you told him that the house

expense element of the bid was $4,970.19, before you submitted it?

A. Right, sir.

Q. Is that right?

A. Yes, sir.

Q. Did you yourself make any effort to compare these figures with the books of the Viking Theatre, or with its operating statement, to check and verify the accuracy of what Mr. London gave you?

A. He told me, sir. I do not have access to the books. Charles S. Rocky Company handles our books.

Q. Well, when you say say Charles S. Rocky handles your books, Charles S. Rocky is a firm of accountants, isn't it?

A. Yes, sir.

(2661)

Q. And did Charles S. Rocky have anything to do with giving you the figures that appear on this operating expense statement?

A. No, sir, I didn't say they did, sir.

Q. Well, you indicated, as I understood your answer, that they had something to do with the operating statements of the company and that might have been the source of the information. Rocky had nothing to do with this, did it?

A. No, I don't know whether Mr. London spoke to them or not, but I didn't speak to Rocky.

Q. When you say that Rocky had the books, Mr. London had them primarily, didn't he—

A. I would assume, yes.

Q. —at the Widener Building?

A. I would assume so, yes.

Q. Mr. London was not only the Secretary of the Viking Theatre he was also an officer of many of Mr. Sley's other corporations, was he not?

A. I don't know that, sir.

Q. Don't you know that?

A. I do not, sir.

Q. Well, Mr. London, who was the Secretary of the Viking Theatre Corporation didn't have his office at 19th and

(2662)

Chestnut Streets where the Viking Theatre has its theatre, isn't that so?

A. I have never said he did, no, sir. He had his office in the Widener Building.

Q. He performed more duties other than that as Secretary of the Viking Theatre, you know that, don't you?

A. I do not know his duties, sir. Absolutely none.

Q. I didn't ask you whether you knew his duties. Don't you know as a fact, Mr. Wren, that Mr. London performed services for Mr. Sley in connection with other corporate business interests of Mr. Sley?

A. I would assume he did. He was the office manager for the Sley System.

Q. All right, then we have that. And the headquarters of that operation was in the Widener Building, which is just east of Broad Street on Chestnut, right?

A. Yes, sir.

Q. About five or six blocks away from the Viking?

A. Yes, sir.

Q. Now, if there is any inaccuracy in these figures that I have just read, you take the position that the inaccuracy could be determined by an audit of your books by Stanley Kramer, don't you?

A. Yes, sir. He had that option at the time that the offer

(2663)

was submitted.

Q. As a matter of fact, the right to audit your books is granted by every license agreement that you sign for the exhibition of a picture, isn't it?

A. There is a chance it might be on the back of the contract. I don't know, sir.

Q. Don't you know that every motion picture distributor in a license agreement, many of which have been identified in this case, has the right in a case where the film rental is based upon a percentage of box office receipts to audit your books to see if your returns are correct?

A. Yes, certainly. He is my partner, in effect, right, sir?

Q. So that the concept of the right to audit the books of a motion picture exhibitor is nothing unusual, it is standard practice in the industry, isn't it?

A. I don't know how much of a standard practice it is. It is their privilege.

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(2664)

Q. Well, let us refer to this particular contract and see what you said about it. Let me read to you from your testimony before this Court and jury on Friday, June 2, at page 2069:

> The Witness: Please let me finish my explanation.
>
> Q. (Continuing)
>
> On the bottom of Stanley Kramer's contract—This was cross-examination by Mr. Nizer.
>
> —subject to audit. Now, don't ask me to go and audit the books for Stanley Kramer. It was his privilege. If he wanted to come in, if he was dissatisfied with this deal, your client, why didn't he express that dissatisfaction. Tell me, you are not going to get the picture until you convince me once and for all that every item you have set down here is exact.
>
> He didn't say that. He said: I will take the deal. Did you so testify?

(2665)

A. I certainly did.

Q. So that your position with respect to the figures that appear on this document that I have just reviewed with you is that it is up to Mr. Kramer to find out by auditing your books whether they are correct or not, right?

A. What I said, and you just read what I said, sir, and I stand by what I said. He could have accepted or rejected the deal. He elected to accept the deal.

Q. He elected to accept the deal in reliance on your representations, didn't he?

A. I didn't say that, sir. I said that these things were subject to his approval. He could have come in at the time and said: I want to examine this, that, or the other before I approve the deal. But he did not do that, sir, he accepted the deal.

Q. You grant, however, that by the terms of the document you signed you represented to United Artists and Stanley Kramer that this was a correct itemized statement of your average operating expenses, did you not?

A. May I complete this document, sir?

Q. Will you answer my question.

A. Yes, sir, that portion of it I did, sir.

Q. And isn't it also a fact that in the same document bearing your signature there appears this: That the distributor,

(2666)

United Artists, relies on the accuracy of said statement in entering into the license agreement attached hereto. You knew they relied on what you said, what you told them, didn't you?

A. That is right.

Q. And if there is any discrepancy between the representations that you made and the actual operating expenses, you take the position that it is up to Stanley Kramer to

find out by exercising his right to audit your books, is that right?

A. Or United Artists could have come over and said: Stanley Kramer wants us to look over this before you are awarded the picture.

They did not do that, sir—

Q. So that you—

A. —nor did Mr. George Schaeffer.

Q. So that you don't then feel any sense of responsibility with respect to the accuracy of your representation; you want to put it all on Kramer and let him check your statements; is that the idea?

A. It was up to him, sir.

• • •

(2667)

RE-DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Wren—

A. Yes, sir.

Q. —as far as you know and as far as you have been able to determine is there any inaccuracy in this statement that Mr. Ward was asking you about?

A. Only as to the average weekly payroll. The first weeks of this engagement the payrolls were much more than itemized here, sir.

• • •

A. As a result of the payrolls in fact being higher than you set forth here, did that mean that the Viking got less money or more money as a result of that error?

• • •

(2668)

The Witness: The Viking got less money on those weeks when the payroll was higher, naturally.

• • •

(2669)

Q. Mr. Wren, do you recall Mr. Ward asking you about the effect of television on the motion picture industry?

A. I do, sir.

Q. In what area of exhibition has the effect of television made its primary impact?

A. Well, I would say the greatest impact has been made in the neighborhood theatres.

Q. Why is that, sir?

A. Well, to begin with, to "go out" means to go first-run,

(2670)

as opposed to going out the back door into a neighborhood theatre. That is first and foremost. It is not the going out event that it is going to a first-run theatre.

Another thing that must be considered is that the auomoboile has made it far easier for people to get from one place to another. People think nothing of driving 15, 20, 25 miles to go to a dinner today, and the same applies.

If they elect to go downtown or they elect to go further out to a movie, they can do it, but I think one of the most imporant factors in this whole thing.

When TV was at its height was when the industry had to look to its laurels and to come in with what we call gimmicks, one of which was 3-D.

Now, the cost of this equipment was very, very expensive. While it was easy for a first-run theatre, comparatively easy for a first-run theatre, to make these installations, not knowing when these pictures would be available to the suburban or neighborhood theatres, posed a problem for the man who was operating a neighborhood theatre.

And by that I mean an outlay of from five to twenty thousand dollars worth of money for a process known as 3-D, where they had to synchronize projectors and put on

special spools, or reel holders, as we call them, plus the special wiring and everything else. It didn't pay the man

(2671)

until he knew the availability of the picture in his particular or given locality to go to a tremendous amount of expense. Nor was he able to as a result of what had transpired prior to this time.

There was a decided drop in theatre attendance, as Mr. Ward has indicated.

Now, following 3-D, we came into processes known as wide screen, you have heard them mentioned, Cinemascope, Vista Vision, and whatnot.

Now, originally Cinemascope was stereophonic sound, meaning surround speakers in the theatre and speakers on the stage, different and out of the ordinary run of the mill; in addition to that there was a special screen which was a very, very expensive item, and I am saying expensive, not in the first-run sense, but in the neighborhood sense, and you may have read of the problems they had with the first screens that were put into theatres. Many theatres put them in and had to take them out because of one defect or another, all brought about as a result of production problems that they encountered.

As you may or may not know, the majority of this broad expanse which is known as the screen up there is perforated, and the biggest problems presented themselves, especially with the advent of 3-D, where they tried to go

(2672)

into the aluminum-covered screen and whatnot. The problem was that after they coated these screens the perforations presented a tremendous problem to them, that is, those littl tiny holes, otherwise the sound couldn't get through, because the speakers are in back of this mass known as the screen. So that if it wasn't perforated there would be muffled sound, or it would have to come out

around the sides, and, as you well know, you can't bend sound around corners, it has to muffle. So it presented a number of problems.

As the result of these production problems the cost was up there so for a theatre in the neighborhood to say, well, THE ROBE is coming to the Fox Theatre, how long it will run I don't know, and how am I going to put the equipment in, because at that time Fox was insisting on stereophonic sound—meaning four-track installations, meaning that one track might have sound, another something else, and the side effects; thunder and the like might come through another on your surround speakers in your theatre. So it became a very costly procedure.

Now, as you know, probably in some of your own neighborhoods, people did not go into Cinemascope at that time. At that time they didn't have anything known as a magoptical prints or prints, prints that could be adapted to any system, as they have today. In those days it was

(2673)

a very costly procedure. So the result was a lot of these neighborhood theaters had to fall by the wayside because of limited funds.

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(2674)

Q. Of the top 75 motion pictures of all time were any

(2675)

after the advent of television?

A. Yes, sir.

Q. How many?

A. 64 of them.

Q. Thank you.

And now, Mr. Wren, do you recall Mr. Rome's BLACK TUESDAY?

A. Yes, sir.

Q. Do you recall the questions that sought to compare the gross that the Goldman Theatre had obtained on BLACK TUESDAY as compared with certain grosses obtained on motion pictures at the Viking Theatre?

A. Yes, sir.

Q. And the comparision that was made in relation to the national film rental?

A. Yes, sir.

Q. Did the Viking Theatre play a motion picture called THE BIG KNIFE?

A. It did.

Mr. Sawyer: Just a moment, sir.

(A blackboard was placed in front of the jury.)

By Mr. Sawyer:

Q. Look at your playoff there. What was your gross on THE BIG KNIFE first week and second week?

(2676)

A. $14,760 first week and the second week of THE BIG KNIFE was $7,581.

Q. And the total?

A. For the entire engagement?

Q. Yes.

A. $32,623.

That is only first and second weeks, Mr. Sawyer (indicating).

The Court: Is the total supposed to be the addition of the two?

The Witness: No, it is not.

By Mr. Sawyer:

Q. How many weeks did it play, Mr. Wren?

A. Four weeks and two days.

Q. All right. Now, what was the total?

A. $32,623.

Q. And it played four weeks?

A. Yes, and two days. Four weeks and two days.

Q. What was the national film rental of that motion picture?

A. $662,000.

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(2721)

Q. Now, Mr. Wren—

I will repeat this to get it back on the board, Your Honor.

—what was the first week's gross on THE BIG KNIFE?

(2722)

A. $14,760.

Q. And what was the national film rental on that picture?

A. $662,000.

Q. What was that first week?

A. November 23 to 30, 1955, noon to noon.

Q. And at that exact playing time, what was the Goldman Theatre playing?

A. MAN WITH A GUN.

Q. And what did that earn in that same week?

A. The gross for that same week was $28,126.

Q. Gross?

And what was the national film rental—

Mr. Rome: You don't mean that to be correct, do you, Mr. Wren, for the first week?

The Witness: No, I am sorry, for the—

Yes, it only played a week. Right, sir.

Mr. Rome: That isn't so, is it? THE MAN WITH A GUN?

The Witness: Yes, sir, that's what we have.

Mr. Sawyer: That is what we have; it played one week.

The Witness: One week.

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(2723)

Mr. Sawyer: What do you have?

Mr. Rome: Nine days.

Mr. Sawyer: Oh, nine days? All right, fine.

By Mr. Sawyer:

Q. You don't have what you got in nine days, do you?
A. No, sir, I do not.
Q. It would be more than this?
A. Certainly.

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(2725)

Q. Now, what was the national film rental on MAN WITH A GUN?
A. $1,473,000.
Q. Did the Goldman Theatre play the picture I DIED A THOUSAND TIMES?
A. Yes, sir.
Q. How long did it play that?
A. One week.

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Q. What was the gross on that one week?
A. $12,735.

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(2726)

Q. How many days did it play?
A. It played eight days.

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(2728)

Q. Now, the Goldman Theatre played the motion picture COUNT THREE—

You want the period of time?

A. You want the rental?

Q. I am sorry. What was the national film rental?

A. $747,000.

Q. Now, did the Goldman Theatre play a picture COUNT THREE AND PRAY?

A. Yes, sir.

Q. What was the gross of that motion picture for the first week?

A. $9,937.

• • •

Q. What was the national film rental of that motion picture?

(2729)

A. $1,000,000.

Q. Now, did the Goldman play a picture CAPTAIN LIGHTFOOT?

A. It did.

Q. What did it gross the first week?

A. $11,249.

Q. What was the national film rental of that motion picture?

A. $1,000,000.

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(2730)

Q. Now, THE MOUNTAIN, what was that, THE MOUNTAIN, the first week?

A. $8871.

Mr. Steinberg: That is 10-18-56.

By Mr. Sawyer:

Q. How many weeks did this picture play?

A. One week.

Q. How many weeks did this picture play, LIGHTFOOT?

A. One week.

Q. How many weeks did you play COUNT THREE AND PRAY?

A. One week.

Q. Now, THE MOUNTAIN grossed $8,871 in its one week. What was the national film rental of that picture?

A. $1,100,000.

Q. Now, did the Goldman Theatre play PILLARS IN THE SKY?

A. It did.

The Court: When, Mr. Steinberg?

Mr. Steinberg: August 30, 1956.

By Mr. Sawyer:

Q. How long did it play?

A. One week.

Q. What did it gross?

A. $10,469.

Q. What was the national film rental of that motion picture?

A. $1,100,000.

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(2732)

Q. Mr. Wren, did the Goldman Theatre play a motion picture TRIBUTE TO A BAD MAN?

A. It did.

Mr. Steinberg: May 2, 1956.

Mr. Nizer: How long did it play?

The Witness: One week.

Mr. Steinberg: One week.

By Mr. Sawyer:

Q. What did TRIBUTE TO A BAD MAN gross?

A. $10,895.

Q. What was the national film rental of that motion picture?

A. $1,200,000.

Q. Now, did the Goldman Theatre play a motion picture SANTIAGO?

A. It did.

Mr. Steinberg: July 4,1956.

By Mr. Sawyer:

Q. July 4, 1956?

A. Yes, sir.

Q. Is July 4 a comparable holiday to Thanksgiving, Mr. Wren?

(2733)

A. I would say it was better.

Q. What did the picture SANTIAGO gross?

A. $8,869.

Q. What was the national film rental of that motion picture?

A. $1,300,000.

Q. Did the Goldman Theatre play a motion picture HOUSE OF BAMBOO?

A. It did.

Q. How long did it play?

A. One week.

Mr. Steinberg: HOUSE OF BAMBOO is June 29, 1955.

(2734)

Q. And what did it gross?

A. $15,492.

Q. What was the national film rental of that motion picture?

A. $1,600,000.

Q. Did the Goldman Theatre play a motion picture LAST HUNT?

A. It did.

Q. How long did that play?

Mr. Steinberg: February 22nd, 1956.

By Mr. Sawyer:

Q. Did that include a holiday, the LAST HUNT?

A. Yes, Washington's Birthday.

Q. How long did that play?

A. One week.

Q. And what did it gross?

A. $9,805.

Q. What was the national film rental of the LAST HUNT?

A. $1,600,000.

Q. Now, did the Goldman Theatre play the motion picture FOREVER DARLING?

A. It did?

Q. When did it play?

Mr. Steinberg: February 15, 1956.

(2735)

By Mr. Sawyer:

Q. And how long did it play, Mr. Wren?

A. One week.

Q. What was the gross on that picture?

A. $12,132.

Q. What was the national film rental of the motion picture FOREVER DARLING?

A. $1,900,000.

Q. Did the Goldman Theatre play the motion picture MANY RIVERS?

A. MANY RIVERS TO CROSS, yes.

Mr. Steinberg: March 1st, 1955.

By Mr. Sawyer:

Q. What was the gross on MANY RIVERS and how long did that play?

A. One week, $15,506.

Q. What was the national film rental?

A. $2,100,000.

Q. Did the Goldman Theatre play the motion picture PARDNERS?

A. It did.

Q. How long did it play PARDNERS?

A. Two weeks.

Mr. Steinberg: August 16, 1956. Is that

(2736)

correct?

* * *

Q. Now, Mr. Wren, what did the BIG KNIFE gross in its second week?

A. $7,581.

* * *

Q. Now, then, for the first two weeks, Mr. Wren, of THE BIG KNIFE what was the gross?

A. $22,341.

Q. And, of course, the national film rental was the same.

A. The same, $662,000.

Q. PARDNERS for its two weeks at the Goldman Theatre.

A. In two weeks it grossed $25,500.

Q. What was the national film rental of that picture?

A. $2,800,000.

Q. Did the Goldman Theatre play REBEL WITHOUT A CAUSE?

A. They did.

Q. For how many weeks?

A. Two weeks.

Q. And in those two weeks what did it gross?

(2737)

A. $32,700.

Q. What was the national film rental of that picture?

A. $3,600,000.

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(2743)

Q. Mr. Wren, do you recall that during Mr. Wolf's examination he gave you some sheets?

A. Yes, sir.

Q. And they were entitled to what Stanley Warner played at a lower national film rental, first of all, during the engagement at the Viking of NOT AS A STRANGER?

A. Yes, sir.

Q. Do you have those sheets there?

A. Yes, sir.

Q. How long did NOT AS A STRANGER play at the Viking Theatre?

A. 12 weeks.

Q. Now, NOT AS A STRANGER played at the Viking 12 weeks?

A. Yes, sir.

Q. Mr. Wolf gave you a list of these motion pictures that played at his theatres, the Stanley Warner Theatres, at this time?

A. Yes, sir.

Q. You have that list there?

A. Yse, I do.

Q. First of all, the national film rental of NOT AS A STRANGER.

A. $6,121,000.

(2744)

Q. During the playing time of NOT AS A STRANGER what pictures did Mr. Wolf list there that played at the Mastbaum?

A. FOX FIRE.
Q. What was the national film rental?
A. $1,618,600.
Q. And the next one?
A. DAM BUSTERS. $364,000.

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(2745)

Q. Is this the actual piece of paper, everything on this is from the piece of paper Mr. Wolf gave you?
A. Yes, sir, it is.
Q. And asked you about—
A. Yes, sir.
Q. —the pictures that played during the time that the Viking was showing NOT AS A STRANGER?
A. Yes, sir.
Q. What is the next one?
A. TO HELL AND BACK, $5,171,000.
Q. Did you total those, Mr. Wren?
A. I did.
Q. What is the total?
A. $7,153,000.
Q. Are they the pictures that played during the same period as the Viking played NOT AS A STRANGER?
A. Yes, sir.
Q. What did Mr. Wolf have on his list at the Stanley Theatre?
A. MOONFLEET.
Q. Yes?
A. $578,000 national film rental.
Q. Yes?
A. LAND OF THE PHAROAHS, $1,813,000.

(2746)

Q. Yes.
A. COBWEB, $1,338,000.
Q. Yes?

A. NEVER TOO YOUNG, $2,866,000.
ONE DESIRE, $779,000.
GIRL RUSH, $689,000.

Q. What was the total?

A. $8,123,000.

Q. During the period that the Viking was playing NOT AS A STRANGER?

A. Yes, sir.

Q. Have you the list that Mr. Wolf gave you for the Stanton?

A. Yes, sir.

Q. How many motion pictures are on there?

A. Nine shows or fourteen pictures.

Q. Fourteen pictures. All right. Not taking the time to list the names of all of them, Mr. Wren, just read them right off, would you?

A. SEMINOLE UPRISING, and WYOMING RENEGADE.
PERIL OF SOUTH PACIFIC.
DEVIL GIRL FROM MARS.
LOOTERS, and MAN FROM BITTER RIDGE.
CREATURE WITH ATOM BRAIN.
MAN FROM BENEATH THE SEA.

(2747)

TOP OF THE WORLD, ROBBERS' ROOST.
SCARLET COAT.
TARZAN'S HIDDEN JUNGLE.
SPECIAL DELIVERY, and GUN THAT WON THE WEST.

Q. What was the total national film rental of those films, Mr. Wren?

A. $6,415,000.

* * *

(2748)

Q. Did MISTER ROBERTS play during this period?

A. Yes, sir.

(2749)

Q. What theatre did MISTER ROBERTS play?

A. The Mastbaum Theatre.

Q. And that was not on the list that Mr. Wolf gave you?

A. No, sir, it was not.

Q. Did it play during the engagement of NOT AS A STRANGER?

A. Yes, sir.

Q. And what did MISTER ROBERTS gross nationally?

A. $7,600,000?

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(2751)

Q. Did you add those two figures together?

A. $14,753,000.

* * *

(2752)

Mr. Ward: I am objecting to a demonstration by means of the presentation on this blackboard in so far as it affects the clients I represent because I cannot refrain from objecting to it on the grounds that it is complete and patently fallacious and, therefore, I must in the interest of protecting my position on the record put an objection on the record in so far as any probative value that this demonstration has.

* * *

The Court: All right. Why is it irrelevant?

Mr. Ward: For this reason. Let me give you a homely example. Let us take, for instance, a small theatre located in some rural section that may play every two or three days and perhaps exhibit a hundred pictures a year and suppose the national film rental on those hundred

(2753)

pictures were a million dollars apiece. Therefore, if you add them up, you will get a hundred million dollars of national film rentals exhibited at a little, small, tiny theatre out in the country somewhere. In contrast to that, take a theatre which runs on a hard ticket basis and exhibits a film, let us say, for a year, day in and day out, week in and week out. It may have a national gross of $6 million, $8 million, $9 million. Therefore, you have got a contrast between one theatre exhibiting one film the year round with 8 million in contrast to a little country theatre with a hundred million dollars in national film rental and I think from what I have said that that presents an entirely unsound basis of comparison. That is what is being done here.

The Court: How do you answer that, Mr. Sawyer, as to its relevancy?

Mr. Sawyer: Yes, sir, the fallacy, Your Honor, is that we are not talking about comparing a second-run or a subsequent-run theatre with any thing first-run. The witness has testified both on direct and on cross-examination and it is obvious from what we have seen in the record that the best grossing weeks of a motion picture are the first week of a motion picture. Between two first-run houses, therefore, the early weeks being those that bring

(2754)

in the best rental, naturally, it is an advantage to be able to play a succession of motion pictures for a shorter time apiece. The thing out in the country is something else again. It has no relevancy again. We are comparing two first-run motion pictures and it has been demonstrated that to have this declining gross. The witness has testified, but, I mean, it has been demonstrated, just every movie shows that the gross always goes down.

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(2757)

By Mr. Sawyer:

Q. Now, Mr. Wren, did Mr. Wolf give you another slip showing the motion pictures that were playing at the Stanley Warner theatres when MAN IN THE GRAY FLANNEL SUIT was playing?

R. Right, sir.

Q. All right, sir. Now, the Viking played THE MAN IN THE GRAY FLANNEL SUIT for 12 weeks. At that time, Mr. Wren, what was playing at the Mastbaum when GRAY FLANNEL opened?

A. FORBIDDEN PLANET.

Q. For what?

A. $1,563,000.

Q. Now, excuse me, Mr. Wren, what was the national film rental of MAN IN THE GRAY FLANNEL SUIT?

A. $3,601,000.

Q. Now you can proceed with the Mastbaum.

(2758)

A. THE KILLER IS LOOSE, $388,000.
ALEXANDER THE GREAT, $1,968,000.
CATERED AFFAIR, $943,000.

Q. For a total of what?

A. $4,857,000.

Q. Now, was there any other picture that played at the Mastbaum while you played GRAY FLANNEL SUIT that was not on Mr. Wolf's list?

A. At the Mastbaum? No, sir.

Q. At the Mastbaum. No, I am sorry, right.

Would you give me the pictures that played at the Stanley Theatre while you played GRAY FLANNEL SUIT?

A. THE HARDER THEY FALL.

Q. What?

A. THE HARDER THEY FALL.

Q. Yes.

A. $1,195,000.
THE SCARLET HOUR, $331,000.
COCKLESHELL HEROES, $588,000.
THE BOLD AND THE BRAVE, $887,000.
STAR OF INDIA, $168,000.
THE RACK, $359,000.
LEATHER SAINT, $471,000.
RAWHIDE YEARS and GOD'S VILLA.

(2759)

Q. How many more do we have, Mr. Wren?
A. Two more shows.
Q. All right.
A. Two more double feature shows.
Q. All right. I will stop writing names. What is the total of all those films while you played GRAY FLANNEL SUIT?
A. $5,982,000, plus MOBY DICK for another $4,500,000.
Q. MOBY DICK?
A. MOBY DICK, $4,500,000, for a total of $10,482,000.

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(2766)

Q. Now, Mr. Wren, do you recall Mr. Nizer asking you—inviting your attention to certain poor pictures, poorer quality pictures that played at the Goldman and Midtown Theatres?
A. Yes, sir.
Q. While you were playing GRAY FLANNEL SUIT?
A. Yes, sir.

Mr. Sawyer: This is a different, slightly different point, Your Honor: it isn't the same thing.

The Court: All right.

(2767)

By Mr. Sawyer:

Q. Now, did he cite to you, Mr. Wren, all of the pictures that played at the theatres that he mentioned while you were playing the—did he cite all of them to you?

A. No, sir.

Q. Now, when the GRAY FLANNEL SUIT opened, did he ask you whether they were playing AUTUMN LEAVES?

A. No. That is the Randolph, sir.

Q. Oh, I mean the Randoph.

A. No, sir.

* * *

Q. What was playing at the Randolph when THE GRAY FLANNEL SUIT opened?

A. THE SWAN with Grace Kelly, $1,700,000.

Q. And then what did the Randolph play?

A. THE SEARCHERS with John Wayne, $4,100,000.

AUTUMN LEAVES, $883,000.

EDDIE DUCHIN STORY, $4,600,000.

Q. So that in addition to the motion picture that he asked you about, did these play during your engagement of GRAY FLANNEL SUIT at the Randolph?

A. Yes, sir.

* * *

(2768)

Q. Now, do you recall Mr. Nizer asking you about JOE MACBETH at the Goldman?

A. Yes, sir.

Q. When you were playing FLANNEL SUIT?

A. Right, sir.

Q. And that very poor movie, MIAMI, was it? MIAMI—

A. MIAMI EXPOSE.

Q. Now, what was the Goldman playing when GRAY FLANNEL opened?

A. SERENADE, which grossed $1,000,000.

Mr. Rome: You don't mean "gross," do you, Mr. Wren?

The Witness: I mean national film rental—

Mr. Rome: All right.

(2769)

The Witness: —of $1,000,000.

TRIBUTE TO A BAD MAN.

By Mr. Sawyer:

Q. Who was in that?

A. I think that was Robert Taylor. I am not certain of that.

Q. What did that do nationally?

A. One million two hundred thousand.

Q. And—

A. SAFARI.

Q. SAFARI.

A. One million two hundred thousand.

Q. Did he ask you about that one?

A. No, sir.

And SANTIAGO, one million three hundred thousand.

Q. And you remember with respect to pictures that played at the Midtown during GRAY FLANNEL that he cited FOREIGN INTRIGUE?

A. Yes, sir.

Q. And STORM OVER THE NILE?

A. Yes, sir.

Q. Two poor pictures?

A. Yes, sir.

Q. Now, what was playing at the Midtown when FLANNEL opened?

A. A moveover of PICNIC.

(2770)

Q. Do you have the national film rental on that?

• • •

(2771)

Mr. Steinberg: Six one.

By Mr. Sawyer:

Q. Six one?

A. BIRDS AND THE BEES, one million three.

GABY or GABY 660,000.

TOY TIGER, 1,100,000.

THAT CERTAIN FEELING, 1,700,000.

Q. And this is all during FLANNEL; right?

A. Yes, sir.

Q. Now, Mr. Wren, do you recall Mr. Nizer asking you about certain poor films that played at the Stanley Warner Theatres during your engagement of BIGGER THAN LIFE?

A. Yes, sir.

Q. Did he ask you about all of the films that played at those theatres during Viking's engagement of BIGGER THAN LIFE?

A. No, sir.

Q. Now, BIGGER THAN LIFE played the Viking Theatre, did it, sir?

A. Yes, sir.

Q. Now, what was the national film rental of that picture?

A. 491,000—491,000.

Q. Now, what was the Mastbaum playing when BIGGER THAN LIFE

(2772)

opened?

A. THE BAD SEED, 2,800,000.

Randolph was playing AMBASSADOR'S DAUGHTER.

Q. Yes.

A. Fox was playing KING AND I.

Q. What was AMBASSADOR'S DAUGHTER?

A. 951,000.

Q. And the Fox, what was it playing?

A. KING AND I.

Q. And—

A. 6,500,000.

The Stanton was playing PROUD AND PROFANE, 2,900,000.

Q. Two million what?

A. Nine.

The Stanley was ending SOMEBODY UP THERE LIKES ME.

• • •

(2775)

Q. You know, Mr. Wren, I forgot to put down the name of this. I think it ought to be. What was the name of the Mastbaum's picture?

A. THE BAD SEED.

Q. Oh. Now, the Stanton—or, Stanley?

A. Stanton was playing—

Q. Stanley.

A. PROUD AND PROFANE.

Q. Yes. We had that. Stanley I am talking about.

A. The Stanley finishing up SOMEBODY UP THERE LIKES ME, one million nine, and then they played THE VAGABOND KING.

Q. Then they played THE VAGABOND KING, which is what we have here?

A. Right, sir.

Q. Now, do you recall, Mr. Wren, that Mr. Nizer—page 1645—Mr. Nizer drew your attention to United Artists pictures that you licensed.

(2776)

A. Yes, sir.

Q. And the United Artists pictures that Stanley Warner played?

A. Yes.

Q. Did he give all of the United Artists pictures that Stanley Warner played?

A. He did not.

• • •

Q. All right; now, what were the other Stanley Warner—the other United Artists pictures that the Mastbaum played?

(2777)

A. The Mastbaum? VERA CRUZ, four million three hundred thousand.

Mr. Wolf: Are you giving any particular periods during which these were played or just—

The Witness: During the period of the suit.

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(2778)

Q. Now, Mr. Wren, we will not bother with the blackboard. During your term with the Viking Theatre what were the other United Artists pictures that played at the Mastbaum Theatre and what were their national film rentals? Just read them if you will.

A. INDIAN FIGHTER, $2,100,000, ALEXANDER THE GREAT, $1,900,000, and JOHNNY CONCHO, $1,400,000.

Q. Do you recall, Mr. Wren, at the outset of Mr. Nizer's cross-examination he asked you how many exhibitors were competing for first-run Philadelphia when you joined the Viking Theatre?

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

Q. Do you recall the number you gave in your answer, the number he gave in his question?

A. 12, I believe.

(2779)

Q. Did that include the Studio and the World?

A. Yes, it would have to.

Q. Now, actually how many first-run pictures played at the Studio during this period?

A. Well, between the period 1/2/55 to 11/12/56 the World Theatre played 45 shows with five first-runs.

Q. The Studio.

A. I am sorry. The Studio, between 1/2/55 and 12/25/56, 32 shows. One first-run with MARTY and a doubtful first-run—and by that I mean LUST FOR LIFE, Metro advised us they were looking for an art house for LUST FOR LIFE, although it was the story of Van Gogh with Kirk Douglas.

Q. What was the Studio's policy with respect to the kind of product they played?

A. By and large art products, or reissues or repeats of films that had fared well.

Q. With respect to the World what was the situation during this same period with respect to the World Theatre; and what kind of policies were they, did they play first-run?

A. A picture like GREEN FIRE an in-and-out policy, but mostly—they played GREEN FIRE, LADY AND THE TRAMP, but most of the time it was repeats or reissues or art films.

Q. Now, do you recall, Mr. Wren—and I am referring to 1158 approximately—I mean 1658, the one that I asked you.

(2780)

Mr. Nizer confronted you with the fact that both Paramount's TO CATCH A THIEF and United Artists' SUMMERTIME had an availability of August 3rd.

A. Yes, sir.

Q. Do you recall that he pointed out that on Paramount's TO CATCH A THIEF you wired Ulrik Smith of

Paramount that you were committed on United Artist's NOT AS A STRANGER?

A. Yes, sir.

Q. But that on United Artists' SUMMERTIME you did bid, make an offer, although the availability of SUMMERTIME was the same as Paramount's TO CATCH A THIEF?

A. Right, sir.

Q. Was that inconsistent, and if so, why, and if not, why?

A. Well, Paramount would have no way of knowing when I could play TO CATCH A THIEF had I submitted an offer on the picture, whereas—

Q. You say, and you submitted an offer?

A. Had I submitted an offer for the picture. So I would either have had to play the picture late, away off availability, and they would be in no position to tell me, as would United Artists, who could tell me even at the end of five weeks, take off NOT AS A STRANGER, because by that time I had earned my guarantee. Or continue on with STRANGER as long as it was profitable to them. Even though I was committed, they

(2781)

could tell me to take the picture off, or they knew that we could play SUMMERTIME following NOT AS A STRANGER, because both pictures, NOT AS A STRANGER and SUMMERTIME, were released by United Artists.

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(2787)

Q. Now, Mr. Wren, you recall at page 1678 Mr. Nizer asked you:

Yes. You were sued often?

and you answered: Yes.

Do you recall that?

A. Yes, sir.

Q. Whom were you referring to as people suing you when you made that answer?

A. The defendant distributors.

Q. Now, Mr. Wren, with respect to house expenses and house allowances, did the Viking always bid on the basis of a certain percentage above a house allowance?

A. No, sir.

• • •

(2789)

Q. What were other types of bids placed by the Viking?

A. Straight percentage, guarantee against percentage. Guarantee versus percentage.

Q. Now, the 32 pictures that the Viking played, how many were licensed to you on the basis of where a house allowance was used that it came into the thing in any way?

A. 10.

Q. And on the remaining 23 did house allowance enter the method by which you paid film rental to the distributors?

A. No.

Q. Now, an instance is where you bid or licensed a picture and did use a house allowance as a method of bidding, did you always use the figure of $4,970.19?

A. No, sir.

• • •

(2791)

Q. What were some other figures that you used in bidding where your bid used the house allowance?

A. $4,900, $4,970.19, $4,975, $5,000.

We submitted bids which were not accepted that contained house allowances of $5,250.

(2792)

Q. Now, what were the—

Mr. Nizer: Has he finished?

And $5,350?

The Witness: And $5,350, yes, sir, and I believe up to $5,500.

• • •

(2798)

Q. How did it happen that the Viking came frequently to use

(2799)

this $4,970.19 figure?

A. Well, it has been accepted by United Artists.

Q. In connection with what?

A. In connection with NOT AS A STRANGER.

Needless to say when we submitted house deals, or house expense, or house allowance type bids to United Artists we incorporated that amount in there.

Q. Now, in other bids where that amount was used, $4,970.19, were you ever asked by a distributor, any distributor, to itemize how you reached the figure?

A. No.

• • •

(2801)

Q. Now, Mr. Wren, this is the itemization of NOT AS A STRANGER; is that correct?

A. Yes.

Q. Now, is there any item in that $4,970.19 for your expenses, coat room, breakfast, lunch, dinner, or whatever?

A. No, sir.

• • •

(2802)

Q. On any occasion, Mr. Wren, where you did use a house allowance in making your bid, did any of your expenses figure therein?

(2803)

A. No.

• • •

Q. Subsequent to the itemization in NOT AS A STRANGER, which came out to $4,970.19, were there weeks subsequent to that in which your house expenses actually were greater than $4,970.19?

Mr. Ward: Objected to, sir, for the same reason that Mr. Rome just expressed. This man has divorced himself from any responsibility for these figures under his testimony. He has said that he depended upon the figures furnished to him by others, that he had no access to them, as he swore. Now he is being asked to analyze these figures and to expand upon them, and I object to it. Unless he wants to withdraw what he said.

Mr. Rome: He said earlier that he never had any access to the books at all. The figures were given to him.

Mr. Sawyer: Well, Your Honor, there is a

(2804)

difference.

I believe that the witness said that as to these items that are in here: Storm sewer and all that kind of thing, that he didn't know they were made out, in the sense that he didn't know how you arrive at so many pennies for heat, freon, gas, and some other things.

(2805)

This, he has clearly said, because those figures were furnished to him by the officer of the corporation and a secretary, but that doesn't mean that the witness might not know—he might or might not know—but there is nothing there that says I want to know whether in a given week the expenses of his theatre ever exceeded a certain figure or not. It is the same thing. I am not asking to analyze these things. I asked him the simple question as to whether or not on some weeks the

actual expenses of the Viking Theatre exceeded 4970.19. I think that is a different question.

The Court: Well, do you know it?

The Witness: Yes, especially with the payrolls, when my managers handed them to me and I approved them and sent them—

Mr. Rome: Will you speak up, Mr. Wren. I can't hear you.

The Witness: Especially with the payroll where my managers send them to me for approval—that goes into the office—I would naturally know, and maybe it would be more or less.

The Court: And how much did they vary?

The Witness: Well, I think we have a list of them there. They varied. They are considerably more the

(2806)

first weeks than there is listed here in the expense rider.

By Mr. Sawyer:

Q. Well, could you say, tell His Honor how much they varied? Do you want the list?

A. May I have the expense rider, please? Here, I got it.

The expense rider with overtime, sir, on the payroll item calls for 2189.08 a week.

Q. Well, here is—

A. Now, here is the payroll ending July the 7th.

The Court: Now, you had charge of this?

A. Oh, yes. The payrolls, the managers have charge of them, they submit them to me for approval, and I send them to the home office.

The Court: Very good.

The Witness: 2,432.78, as against the 2189.08 that was contained in the expense rider. That is with week ending July the 7th.

July the 14th—

Mr. Ward: What year?

The Witness: 1955, sir.

Mr. Ward: I call Your Honor's attention to the fact that the United Artists bid was May 2nd, 1955.

Mr. Sawyer: This is the actual payroll date we are referring to.

(2807)

The Witness: I am saying this is the actual payroll during the period that the picture was playing, Mr. Ward.

• • •

(2809)

Q. I was asking, I believe, when Mr. Ward interrupted, were there weeks subsequent to this time in which the 4970.19 figure came into existence in which your actual house expenses at the Viking were less than 4970.19?

A. I would say so. The payroll would drop on the later weeks.

Q. Now, Mr. Wren, do you recall being asked by Mr. Nizer whether in your judgment the seating capacity of a theatre was a factor in its ability to gross?

A. Yes, sir.

Q. And do you recall your attention being invited to the fact that the Mastbaum Theatre has 4,387 seats or 78 seats?

A. Yes, sir.

• • •

(2815)

Q. Now, Mr. Wren, what was the best gross ever attained by the Mastbaum Theatre on any motion picture that showed during the entire period of this suit?

A. $135,000 with MR. ROBERTS.

Q. And what did MR. ROBERTS—what was the national film rental of MR. ROBERTS?

A. $7,600,000.

Q. Now, at the time MR. ROBERTS was playing, what was the Viking playing?

A. NOT AS A STRANGER.

Q. And what did the Viking gross on that picture?

A. $166,000.

Q. And what was the national film rental of the film NOT AS A STRANGER?

(2816)

A. Six million one, I believe.

Mr. Nizer: Now, will you please give the number of weeks for that, if you are going to do that.

Mr. Sawyer: Yes, sir. Is it agreed that the two—all right; let us have that. Let us have that.

Mr. Nizer: And also the time.

By Mr. Sawyer:

Q. Now, will you give me the dates on STRANGER?

A. 6-30 to 9-21-55.

Q. 30?

A. To September 21, 1955.

Q. 21st or 31st?

A. 21st.

Q. Thank you, sir. Now, what did you do, Mr. Wren, on that?

A. $166,000.

Q. And that was six million one?

A. Yes, sir.

Q. All right. Now, MR. ROBERTS. What were the dates?

A. Started in the Mastbaum middle of July—right, sir? —July 12th?

Mr. Wolf: 7-15 to 9-2—six weeks.

The Witness: 7-15 to 9-2—six weeks.

Mr. Nizer: The other one was how many weeks,

(2817)

12? 6 and 12.

By Mr. Sawyer:

Q. To what?

A. To 9-2. $135,000.

Q. And that did—

A. Seven six.

• • •

Q. Now, did any gross exceed this at the Mastbaum during

(2818)

this period?

A. No, sir.

Q. Now, what did the Viking do on GRAY FLANNEL SUIT?

A. $138,000.

Q. What are the dates?

A. 4-18 to 7-11-56.

Q. And what was the national film rental of that picture?

A. 3-6, 3,600,000.

• • •

(2823)

Q. Now, GUYS AND DOLLS we are talking about, Mr. Wren?

A. Yes.

Q. The largest grossing theatre first run—the largest grossing motion picture first-run Philadelphia?

A. Yes, sir.

Q. And where did it play at again?

A. The 2,020-seat Randolph.

(2824)

Q. And is that the largest theatre in Philadelphia?

A. No, sir—fourth largest.

• • •

Q. What was the second largest gross of any motion picture?

A. COUNTRY GIRL, 243,000, at the 994-seat Midtown.

Q. Now, now does the Midtown rank in order of size of the theatres we are dealing with here, including the Viking and the defendants' theatres?

A. Just slightly smaller than the Viking.

The Court: And how long did it run?

A. 16 weeks, 15—almost 16 weeks.

• • •

(2826)

Q. Correct? 15 weeks.

Now, second—

A. COUNTRY GIRL played the same number of weeks at the Midtown.

Q. 15 weeks? And it grossed the second highest gross, two hundred—

A. 243.

Q. $243,000.

A. And 994 seats.

Q. And 994 seats at the Midtown which is the smallest of the big theatres here involved.

The Court: All right. Now, what was the biggest, Mr. Wren? What was the biggest gross at the Mastbaum?

Mr. Sawyer. One hundred thirty-five.

I am sorry, I shouldn't answer, but it is in evidence, Your Honor, $135,000.

The Court: And how long was that?

The Witness: Six weeks.

The Court: Six weeks?

The Witness: Yes, sir.

The Court: In other words, the Mastbaum was how much?

The Witness: $135,000 in six weeks.

(2827)

The Court: What?

The Witness: $135,000 with six weeks with MISTER ROBERTS, but the interesting thing is the first week at the Viking, and going by Mr. Rome's figures of $1.49, it outgrossed, the 1000-seat Viking outgrossed the 4300-seat Mastbaum. They had MISTER ROBERTS and we reduced the prices from $1.80 at his suggestion to $1.49. We have taken them on paper there and we still outgrossed the Mastbaum, the 1000-seat Viking, with NOT AS A STRANGER, outgrossed the first week of MISTER ROBERTS with a 4300-seat theatre.

The Court: There again, you have an argument, you have a point, but I don't think it is conclusive in any way because the Mastbaum for six weeks say, one-third, grossed one-third of the biggest gross there of 16 weeks. However, I will permit it.

Mr. Sawyer: It is interesting.

The Court: I will permit it.

Mr. Sawyer: Thank you, sir.

The Court: All these figures, I think, the jury understands. They will listen to argument as to the significance in the comparisons.

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(2829)

EIGHTEENTH DAY

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(2841)

JAY WREN, resumed.

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RE-DIRECT EXAMINATION (continued)

By Mr. Sawyer:

Q. Mr. Wren, do you recall that Mr. Nizer asked you during your cross-examination about instances where the Viking was alleged to have played a picture off availability?

A. Yes, sir.

Q. And do you recall being asked at the same time about opening dates of films?

A. Yes, sir.

Q. Film opening dates?

A. Yes, sir.

Q. Is there a difference between an availability date and an opening date?

A. Definitely.

Q. What is that difference?

A. The availability date is the availability date contained

(2842)

in the solicitation letter or the advice given to you at the time that the competitive bid application reaches you, or the

request for offer, whatever it is termed, as opposed to the opening date which is the date that you agree to open the picture.

Q. Now, do you recall—page 1681—Mr. Nizer asking you:

"Haven't you shifted availability dates like every exhibitor under exigencies? Haven't you now, Mr. Wren?

"A. Mr. Nizer, every picture I get I am asked, when are you going to open the picture? Before the picture is ever awarded to me.

"Q. Sure. So is everyone else asked that. But my question is, when you find yourself in some kind of booking difficulty have you ever had that? Haven't you moved pictures forward and backward?

"A. Very seldom, sir. I think you can count them on two fingers.

"Q. Well, let us start with the two fingers. You have done that, haven't you?

"A. I am trying to recall.

"Q. From your experience as a theater operator isn't it a practical matter that unless there is a specific reason for opening a picture, let us say a holiday, or

(2843)

a summer date, like this one, August 3, they wanted to get it out nationally on a particular date, had a special campaign—but take the average picture, and if you find yourself in difficulty after you have bought it, and you have said I will play it on August 3, then you say, Now, look, I held over the other picture, it is doing well, and I can play it another week; will you shift it to August 10; isn't that done in the business regularly?

"A. Not for us, sir, no."

Do you recall that there then was discussion not about opening dates but availability dates following this colloquy?

A. Yes, sir.

Q. Now, I ask you, did you ever play a picture at a date other than the specified opening date?

A. I can't recall a one.

Q. So did you use up your two fingers, Mr. Wren?

A. Not as yet.

Q. Now, do you have any grievance, did the Viking Theatre have any complaint about the shifting of availability—now, I am not speaking of opening dates, of availability dates per se.

A. Definitely not.

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(2849)

Q. Do you recall, Mr. Wren, stating to Mr. Nizer the fact that the Viking had no opportunity to screen STRATEGIC AIR COMMAND; it was only one of your grievances on that picture?

A. Yes, sir.

Q. And I might say, before we come to that, have you gone to screenings outside of Philadelphia?

(2850)

A. Yes.

Q. In what places?

A. Stamford, Connecticut; New Rochelle; New York City.

Q. Have you ever gone to Hollywood?

A. No, sir.

• • •

(2851)

Q. Now, Mr. Wren, what was the biggest motion picture ever produced of all time?

A. TEN COMMANDMENTS.

Q. And what is the national film rental of hat picture up to this time so far, approximately?

A. A little over twenty-five million, I believe.

Q. And do you recall how long Mr. Nizer said it ran when he was asking you about it?

A. I believe he said four hours.

Q. Now, did that play the largest Philadelphia theatre?

A. No, sir.

Q. What theatre in order of size did it play?

(2852)

A. The fourth largest—the Randolph.

Q. And is that the largest Goldman Theatre?

A. Yes, sir.

Q. Now, how many seats does the Randolph have compared to the Mastbaum?

A. Just about half, a little less than half.

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(2857)

Q. Now, do you recall, Mr. Wren, being asked about whether or not you had occasion to give refunds—

A. Yes, sir.

Q. —at the theater for people that couldn't be admitted?

A. Yes, sir.

• • •

(2858)

Q. Do you recall that Mr. Nizer said:

"Q. While I count them up you can check me. They are well over 3000, close to 4000."

Now, taking Mr. Nizer's figure of $4000—that 4000 refunds, that is for how long a period, Mr. Wren?

A. 123 weeks.

Q. And in dollars at the box office after taxes, what would that amount to?

A. Four thousand tickets. If we figure them at $1.50 would be $6000, and figure the film rental at 50 per cent would be $3000, divided is about $24 a week.

Q. $24 a week?
A. Yes, sir.
Q. To the distributor?
A. That is right.

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(2859)

Q. Now, do you recall Mr. Nizer demonstrating, Mr. Wren, on the blackboard that the Viking sometimes offered higher guarantees for pictures that had lower national grosses than on others that had higher national grosses?
A. Yes, sir.

Mr. Ward: You mean national film rental.

Mr. Sawyer: National film rental.

By Mr. Sawyer:

Q. And do you recall that he drew the conclusion that you had not always correctly estimated in advance the value of a motion picture?
A. That is right.
Q. And is there any other factor other than to evaluate what the value of a motion picture is that determines the size of the guarantee the Viking would offer?
A. Well, necessity dictates, if we are in dire need of the film, it stands to reason you are going to offer better terms and cash than you will if you don't need a picture.

(2860)

Q. Do you recall being asked about the guarantee on PICNIC?
A. Yes, sir.
Q. What was that amount, Mr. Wren?
A. $27,500 I believe.
Q. Do you recall that that guarantee was contrasted with the very high ultimate gross of PICNIC?
A. Yes, sir.
Q. Now, did the defendant exhibitor who ultimately played that picture offer any guarantee?

A. No, sir.

• • •

(2873)

Q. Mr. Wren, with respect to the picture THE HARDER THEY FALL—page 2011—do you recall being asked, Mr. Wren, about a screening of that motion picture? Do you recall a letter asking for the screening of the whole picture and not just two reels?

A. Yes, sir.

(Document is shown to defendants' counsel.)

Mr. Sawyer: I would like to have this marked Exhibit P-178 for identification.

(A letter from Columbia Pictures Corporation to A. Montague dated January 16, 1956, was marked Plaintiff's Exhibit 178 for identification.)

By Mr. Sawyer:

Q. I show you a document that has been marked P-178 and I ask you who was that letter from.

A. Mr. Abraham Montague, vice president and general sales manager, Columbia Pictures Corporation.

Q. To whom is it addressed?

A. Just "Dear Friend."

Q. And was it received by you at the Viking Theatre?

A. It was.

Q. Would you read the letter, please.

You will recall that I wrote you several months

(2874)

ago regarding a truly exceptional picture I had just seen at our studio. That was PICNIC. I have since enjoyed the thrill of having my opinion confirmed by all who saw it.

On my most recent trip to the studio I saw the rough cut of another film. It is an entirely different

kind of entertainment, but, I believe, has the same mark of box office greatness. It is THE HARDER THEY FALL, starring Humphrey Bogart. A timely, outspoken story by Budd Schulberg, who wrote ON THE WATERFRONT—

Q. That is sufficient.

• • •

Q. What is a "rough cut," Mr. Wren?

A. It is a rough cut of the picture prior to the final sound track, final dissolved color check.

Q. Is it the complete picture or is it only excerpts therefrom?

A. No, it is practically the complete picture subject to additional editing after previewing, naturally.

Q. Now, with respect to the Universal matter, Mr. Wren, there was introduced in evidence, if you recall, certain sheets,

(2875)

work sheets, that were used in Mr. Dana's office for the four motion pictures. Do you recall that?

A. Yes, sir.

Q. This was marked D-42.

A. That's right, sir.

Q. Do you recall that sheet that was passed to the jury?

A. Yes, sir.

Q. Now, is that sheet that you have there, Mr. Wren, the contract for the licensing of the four Universal pictures?

A. No, sir.

Q. Now, I show you the four Universal contracts. Do you recall, just to save time, Mr. Wren, that both Mr. Nizer and Mr. Goffman asked you if you weren't committed to certain specific opening dates for these contracts for the playing of these pictures?

A. Yes, sir.

Q. These contracts being in evidence.

I show you the four contracts for those pictures and I ask you whether you have examined them.

A. Yes, sir.

Q. Is there any provision in those contracts committing you to a specific playing time or opening date?

A. No, sir.

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(2878)

Q. Do you recall, Mr. Wren, that you stated that you had never actually testified at the Universal case except on deposition?

A. Yes, sir.

Q. And that Mr. Nizer then asked you whether in fact you had not taken the stand in the Universal case?

A. Yes, sir.

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(2880)

Q. How many questions, Mr. Wren?

A. Four questions.

Mr. Sawyer: Four questions and there are two on another page.

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(2881)

Q. Do you recall, Mr. Wren, that Mr. Nizer asked you with respect to a series of letters and perhaps wires between you and Mr. Dana as to the licensing of the four motion pictures, these being the same series of wires that we have just referred to?

A. Yes, sir.

Q. In connection with this counterclaim business.

A. Right, sir.

Q. And then you recall that he showed you a letter dated October 1, from Mr. Dana to you, and asked if you

ever answered that, inviting you to come to the solicitation of a picture, and asked you if you ever answered that letter, and, if so, to produce your answer. Do you recall that?

A. Yes, sir.

Q. Now, did you answer that letter?

A. I went to New York to see Mr. Dana the very next day.

(2882)

Q. Very well.

Now, sir, when did your then counsel first write to the defendant distributors informing them that an antitrust suit was going to be brought by the Viking Theatre?

A. I believe to all defendant distributors about the middle of July, 1956.

Q. And when were the three suits started against the Viking?

A. Within about a period of three weeks after that.

Q. By whom were they started?

A. By the defendant distributors.

Q. Which ones, Mr. Wren, if you recall?

A. The first one by Universal, and then on the same day Loew's and Twentieth Century-Fox.

Q. And do you recall Mr. Nizer asking you whether Bernie Brooks and Yurasko of Stanley Warner had not invited you, in some wordage, whatever it may have been, to talk about a split at this luncheon meeting? Do you recall that?

A. Yes, sir.

Q. And when was that event?

A. August.

• • •

(2884)

Q. August what year, Mr. Wren?

A. 1956.

Q. The same year?

A. Yes, sir.

Q. Now, prior to the letter from your lawyers which you state was about the middle of July, were you ever invited to join the split?

A. No, sir.

Q. Now, do you recall Mr. Goffman asking you, Mr. Wren, whether these wires, particularly wires which stated your reasons for not, for declining to submit a bid, were prepared by your counsel?

A. Yes, sir.

Q. And you were asked—do you recall Mr. Nizer asking you repeatedly about your sending of these wires?

A. Yes, sir.

Q. Now, what was the first wire you ever had occasion to send in connection with the Viking Theatre?

A. In connection with the Viking?

Q. Yes, sir.

A. EAST OF EDEN.

(2885)

Q. And did you have anyone's advice with respect to the idea of sending a wire and with respect to sending this first wire?

A. Mr. Mansell and Mr. Beilan at the conclusion of the luncheon told me if I—if a prior commitment prevented me from playing the picture, please advise them.

Q. What picture was it?

A. EAST OF EDEN

Q. And was that the genesis of your using wires?

A. Yes, sir.

• • •

Q. Now, I show you a document that has been marked P-179 and ask you what that is.

A. It is a pencil copy of the wire that I stopped at a Western Union office somewhere near Vine Street to send to Mr. Mansell, as he requested.

Q. And in whose writing is it, or printing?

A. It is my printing.

Q. And is that the telegram, the first one that you referred to?

A. Yes, sir.

Q. Now, do you recall Mr. Goffman asking you about STRANGE LADY IN TOWN?

A. I do.

Mr. Sawyer: 2366, Mr. Goffman.

By Mr. Sawyer:

Q. And do you recall that Mr. Goffman asserted as a fact that we accept the availability on STRANGE LADY as being April 30, 1955?

A. Yes, sir.

Q. And do you recall Mr. Goffman pointing out to you that you couldn't have played it on April 30 because of THE GLASS

(2887)

SLIPPER?

A. Yes, sir.

Q. And when would you have been free of your commitment on GLASS SLIPPER?

Mr. Goffman: Just a moment. Did you say 2366?

Mr. Sawyer: 66.

By Mr. Sawyer:

Q. When would you have—go ahead. I will let you look at your record.

A. On the 11th of May.

Q. And how many days off of availability would that have been?

A. 11.

Q. Now, when did the picture actually open at the Stanley Theatre?

A. 15 days before availability, I believe it was.

Q. How many?

A. 15.

Q. Well, when did it open? Do you remember the date?

All right. That is enough, Mr. Wren. I won't prompt you.

A. I believe it was 27 days.

Q. Now, on the picture McCONNELL STORY—this is page 2390

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(2888)

Q. The picture McCONNELL STORY, do you recall that in a number of pages, 2390 and succeeding, Mr. Nizer, I believe—no, Mr. Goffman—I am sorry—Mr. Goffman sought to point out that you couldn't play McCONNELL STORY on availability of August 25th because you were committed on NOT AS A STRANGER until September 8. Do you recall that, sir?

A. Yes, sir.

Q. And how many days difference is there between the availability of August 25th and September 8th?

• • •

Q. Now, where did the McCONNELL STORY actually play, Mr. Wren?

A. At the Randolph Theatre.

Q. And at that time was the Randolph Theatre committed?

A. Yes, sir.

Q. And on what picture and until when?

(2889)

A. SUMMERTIME from August 3rd for eight weeks.

Q. And that would take them until when?

A. October.

Q. Not quite; and how many days difference, then, was there between the availability of August 25th and the time at which the Randolph, observing their commitment on SUMMERTIME, could have played?

A. If they observed their commitment on SUMMERTIME, they could not have put in McCONNELL STORY until almost a month after Labor Day.

Q. How did Mr. Goldman solve that problem, Mr. Wren?

A. He took off SUMMERTIME at the end of four weeks.

Q. And then did he play McCONNELL STORY?

A. He did.

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Q. How many days late off of August 25? Do you remember, Mr. Wren?

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Mr. Goffman: We all know. It was August 31, wasn't it?

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(2890)

Q. Mr. Wren, I believe you have a sheet there marked "Tabulation No. 3."

A. Yes, sir.

Q. And I would like to see it myself, if I may. I am sorry. I have forgotten which one it is. All right. Very well.

Now, Mr. Wren, do you recall that during Mr. Wolf's cross-examination he asked you to mentally divide pictures into two groups which he said that he would designate as "A" and "B," "A" being the good pictures and "B" being the inferior pictures. Do you recall that, sir?

A. Yes, sir.

Q. And do you recall that he was then going to—that he then asked you the national film rentals of certain pictures that the Viking played, some dozen or so pictures, perhaps 20 or 20-some, and do you recall then that he cited 62 pictures by name which he read in which the national film rental was lower than the pictures that he selected from the Viking? Do you recall that?

A. Yes, sir.

Q. That played at the Stanley Warner Theatre?

A. Right, sir.

Q. Now, I will ask you, Mr. Wren, whether or not you have—this should be on the blackboard, Your Honor—with respect

(2891)

to just Stanley Warner pictures and with respect to the national film rentals thereof whether you have added together the total national film rental of all motion pictures from the defendant distributors which played the Viking Theatre during the period of this suit?

A. We have.

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(2892)

Q. And what is that sum total of the national film rental of all of these pictures?

A. $45,456,000.

Q. Now, have you added together the total national film rentals of all motion pictures during this same period, the period of the suit, that played at the Mastbaum Theatre?

A. Yes, sir. $77,935,000.

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Mr. Wolf: Now that I see what Mr. Sawyer has asked the witness, I must enter my objection, because it is

(2893)

perfectly obvious, as has been said here before and I think called for a ruling by Your Honor against the admission of similar testimony, that the national film rentals aggregating depended entirely on the number of pictures played.

In other words, if you play one picture one week at a national film rental of about $5,000,000 and then play

two pictures in one week, each with a national film rental of $4,000,000, you get $8,000,000, but that has nothing to do with the quality of the pictures, merely a question of the number of them that you happen to play. The shorter the playing time of any picture, the more numerous the pictures are, and the more numerous the pictures are, of course, the higher national film rental you aggregate, but at the same time the fact happens to be that the more you have to play the poorer they are,—

Mr. Sawyer: Oh, no, Your Honor.

Mr. Wolf: —that, therefore—excuse me—

Mr. Sawyer: This is argument, Your Honor. This is argument.

Mr. Wolf: May I finish? I know you don't agree with me.

That that proves, therefore—I mean, the result of that is that these figures have no meaning whatever with

(2894)

respect to any matter of comparison between what was played at the one and what was played at the other.

I ask that the answer be stricken as entirely irrelevant and immaterial.

The Court: Well, we had the problem yesterday, and I recall Mr. Ward gave the example of a picture, say, in the country or in a small town. Now, as I understand it, Mr. Sawyer, that represents the national film rental, forty-five million, of all pictures exhibited at the Viking.

Mr. Sawyer: Yes, sir.

The Court: Now, as I understand it, you propose to show the national film rental of each theatre; is that right?

Mr. Sawyer: At this point, Your Honor, I think I am only entitled to show at this particular point with respect to Stanley Warner, because it was—that this was the point that Mr. Wolf brought—or, this is to rebut the same exact conclusion on the other side, but I did intend to show it ultimately at each theatre, and here for each Stanley Warner Theatre, Stanley—

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The Court: I mean, what does it tend to establish?

Mr. Sawyer: It tends to establish—it tends to establish, Your Honor, that during the period of the suit that the defendant exhibitors were accorded better product than the Viking by the differences here, that the only way you can measure, the only yardstick that we have is this yardstick of national film rental—we all agree it is the yardstick—and, Your Honor, there is only one way to tell quality, and that is how much quality passed through these exhibitor houses during the period of suit.

This is the quality out of which they had to extract the grosses that they were all trying to get. It seems to me that it is a perfect measure of that.

Now, it is true that the defendants got—had more motion pictures, most of them—well, they all had more, but so much the more so. That is part and parcel of the complaint, that we didn't get as many.

Now, if one thing has been established, Your Honor—and this was, I think, a part of yesterday—it has been established immutably as a fact of first-run exhibition that a motion picture grosses its highest in the first week, first weeks, if it is a good one, if it is a long run.

(2896)

Now, in the sense that everybody wants long runs, that is a symptom of a good picture, because normally

you don't have a long run unless it keeps earning, but the fact is that—nobody disagrees with this; it is almost predictable—that each week grosses go down; therefore, the more motion pictures you get, within reason, the more motion pictures you get, you can skim the cream off—you just play them for their best weeks—so that it isn't—we are not to be reproached with the fact that they got more. They sort of put this as if it were a burden to them—and not at all.

I mean, as Mr. Wren testified once—and we tried to find out once; I think we didn't get it in and it came in later in cross—on these indifferent movies, not maybe the absolute worst ones—you could lose money from the first week—but on the indifferent movies, around a week or less, you could put those in and take them out in a week. You are not going to get hurt much. You may make a little money. But if you are playing it two or three weeks, you are going to get hurt badly, because the first week is the only one that is ever going to clear you. After that your house allowance—remember, he testified his house allowance—excuse me—his own actual expenses there, that goes on week after week after week. It is always the

(2897)

same, or roughly, Your Honor—

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Mr. Sawyer: —and so it is a declining thing.

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(2898)

Mr. Sawyer: Therefore, Your Honor, to just summarize, the contention is that the only way you can measure—the only way you can measure whether one theatre got better product than another—now, whether they got it as a fact, because that is the first thing you

have to establish—is to take the over-all national gross of all of the motion pictures that played there during the whole period, because that is the measure of value. That is what they had to deal with. That is, so to speak, is what ran through that house during that time.

And then for that reason, Your Honor, playing time—or, to put it another way, more motion pictures doesn't tend to rebut this or to make it irrelevant.

On the contrary, we say to Mr.—what is the name? —when they say they played more pictures, we say, "Indeed, you did," and that is one of our complaints, because you can't—remember, Mr. Wren testified that it is a function between worth of product and playing time and between worth of product and film rental. We haven't come to film rental yet. I won't go into that.

But, Your Honor, you can actually keep your head above water in this business playing fairly poor, not the worst product, but fairly poor product, if you can put

(2899)

it in and take it out. You want some good product, but even that would do, if you can—if you are allowed to play them only a week and pull them out, so that it is an advantage to play these things.

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Mr. Sawyer: But, Your Honor, you see—I think that is well taken—that is the reason we say that this is not only relevant, but we think it is determinative, but that is a matter of weight, but that this is fair measure and actually the only one that is available.

It didn't mean anything, Your Honor, to take our best picture like NOT AS A STRANGER.

The Court: What do you mean by it is the only one available?

(2900)

Mr. Sawyer: Well, to take an individual picture, for instance—

The Court: The national film rental could be compared as between pictures you got at the Viking and pictures which somebody got as to whether they were top quality, but—

Mr. Sawyer: Well, that is what this is.

The Court: Well, yes, this is the gross—

Mr. Sawyer: This is all of them. I say, why take a few? In other words, isn't it true—you see, what Mr. Wolf did is that he, as an advocate does, he took GRAY FLANNEL SUIT and NOT AS A STRANGER—and they were our two best, as everybody now knows, and then you can pick out dozens, I suppose, that are worse —well, this is just doing in portion what I'm doing here in whole. I mean, this is taking one picture and comparing it with another. You can do that. I don't have any objection to it. I did some yesterday on a selective basis.

Now, I say, "Let's look at the whole thing—good pictures, bad pictures, indifferent pictures, all of the pictures." What was the national gross of all of them? This is no different than just—you can break this down. This is the combination of a NOT AS A STRANGER, of a FOX FIRE, of all of these different pictures put together, MAN

(2901)

IN THE GRAY FLANNEL SUIT, RED VELVET SWING, and everything else.

Now, that is what this figure is. It is all of them added together. We have had some of them individually.

The Court: All right. Now, I understand that. Now, then, Mr. Wolf.

Mr. Wolf: The result of the argument that is being made now is that if we had better pictures and therefore played fewer of them, we would have a lower total national film rental. The thing is completely paradoxical. The more pictures we have to play, obviously, the larger the total national film rental will be—it is no evidence of anything— and if the figures here were divided by the number of pictures that were played, the result would be that it would be found that the average national film rental of those pictures we played was way under the average national film rental of the pictures that he played.

(2902)

The result would be this: If a house was lucky enough to get five or six of the very best pictures that there were in a year it would be the most profitable house in the United States, and its national film rental added up would be very much lower than that of a house that had to play nothing but slough and had to put in one picture every week. The total has no bearing whatever on the quality unless the number of pictures is taken into consideration and an average is made from them, and even then it proves nothing except that the quality of pictures that was played in a particular house was either better or worse than the others, depending on how many pictures they had to play. But just in itself on a global basis like this it has no meaning whatever and I respectfully ask that the figures be erased.

Mr. Rome: So that what Mr. Wolf has said to Your Honor may be pointed up may I use it as an illustration, sir, of the fact that if the Viking had played GUYS

AND DOLLS which has already been testified here as having had the greatest gross during the period in the City of Philadelphia for 15 weeks, COUNTRY GIRL, which had the next greatest for 15 weeks which it played, NOT AS A STRANGER, the Viking's biggest grosser, for 12 weeks which it played, and MAN IN THE

(2903)

GRAY FLANNEL SUIT, for 10 weeks, which it did play, this would have taken up a total of 52 weeks, and if you were then to take these blockbusters, recognized by all, and add up the total national film rental of those too, you would come to $22,500,000, as contrasted with the Viking's $45,000,000, and this I submit, therefore, demonstrates the utter fallacy and the paradox of what Mr. Sawyer is attempting to do here, because there the Viking would have played 52 weeks in the year with blockbuster pictures, and yet, by Mr. Sawyer's own reasoning, it would be a much lesser demonstration of grossing potential and everything else, and hence I would add my own objection to the admissibility of this testimony.

Mr. Sawyer: This is a two and a half year period. So if he had $22,000,000 worth of product in less actually than a year what he concludes would not be true.

Your Honor, just let me point this out, these long-run blockbusters that are at the defendants' theatres will be in here. If I were to take them out or something that would be different. They will be in here; the very long runs on COUNTRY GIRL, for instance, and GUYS AND DOLLS, and any of the other long runs, they will go in here. So that that automatically corrects itself if that is true. They will all be in. It is the sum total.

(2904)

If it is relevant at all to compare one thing against another how could it be irrelevant to compare all against all? That is my point.

You see, Mr. Wolf keeps acting as if it is a terrible hardship to have to play a lot of motion pictures, which I think is inconsistent with this concept of shortage of first-run, which they tried to bring out with Mr. Fabian. I mean is there a shortage or is there a surplus?

If their contention is that there is a shortage, isn't it then grand that his theatres can get so many pictures? This isn't a hardship to get very many pictures, it is an advantage, so I don't see how you can turn that factor around.

Your Honor, I think this is of the essence.

Mr. Ward: May I be heard for just a moment, sir? I shall not be long.

I spoke to this matter yesterday and Your Honor has graciously indicated that you recall what I said.

This demonstration is so patently fallacious that I would just like to give another example of how distorted it is and what an erroneous impression it conveys.

Here is an attempt being made to measure the quality of motion picture films by totalling national film

(2905)

rentals.

I might point out parenthetically that most of the product included in this seventy-seven million dollar figure on the board the Viking never even attempted to get.

Apart from that, let us consider the Radio City Music Hall in New York, with which I think everybody in this courtroom is familiar, and, as Mr. Rome has pointed out, they play, because of the nature of that

theatre, so-called important pictures, and if you add up the national film rentals of those pictures, which play for some length over there, you will get a figure, let us say, fifty million dollars in a year's time.

Now, in contrast to that, go to some side street grind house, as they are called, where they open in the morning and they keep the machines going, the projectors going around the clock, playing double features and the like, with quick changes during the week; maybe they would play a film or a double feature for two days and then they bring in new films. If you add up the total film rental of all those films played by this side street grind house you will get an astronomical figure.

Is that a fair basis of comparing Radio City Music Hall and the side street grind house? Obviously not, I need not labor it. And that is exactly what this seeks to

(2906)

achieve.

Mr. Sawyer: Now, Your Honor, I would like to reply to the side street grind house, because the fallacy of that is that the side street grind house is not on first-run.

Mr. Ward always gets up in the country with the country theatre.

Of course, nobody claims that you can compare the side street grind house or the emporium in Sioux Falls, North Dakota, policy, with first-run, because there they do put pictures through faster.

We are comparing first-run, and if the side street grind house was on first-run and played a new first-run picture every two or three days, that is a theatre that I think we would all like to own. That is the fallacy of that.

Also I would like to count up what Radio City Music Hall gets in in national film rentals.

Mr. Ward: I hardly think a reply is necessary to what my friend has said.

The Court: As I indicated even yesterday, Mr. Sawyer, particularly when you put MOBY DICK in there, and I think the record will indicate that I had said that from what you were trying to show, it would indicate to me as a good business matter, it would be better for an exhibitor to

(2907)

stay away from a 12-week picture like GRAY FLANNEL SUIT. When they get to the last week their earnings are down to $5,000 or less gross, boxoffice receipts. I think as you argue now, using your words "each week," you put in a picture and take it out, you get the benefit of the first week's gross.

As I said, I really questioned the weight of it, and I think I indicated that it did not have much significance in my judgment as a matter of weight, but I do think that it is an improper comparison for the reasons advanced by defendants and I will reverse my ruling and sustain the objection as to any testimony of this nature, as to the totals. I am only talking now about the grosses—

Mr. Sawyer: Now, Your Honor—

The Court: —the total national film rentals.

Of course, I agree with you that if you compare the national film rental of GRAY FLANNEL SUIT with some other picture why, that is a comparison as to whether it is top flight or not.

Yes?

Mr. Sawyer: Would Your Honor feel differently about this demonstration if I also put next to it the number of pictures that the theatre played in order to get to that point? Wouldn't that clear up the difficulty?

(2908)

The Court: Pardon me?

Mr. Ward: I volunteered, sir, the comment that I wouldn't feel any differently about the basis of my objection. Mr. Sawyer asked Your Honor whether you would feel differently. I simply would ask to be heard that I would not feel any differently.

Mr. Sawyer: I know how Mr. Ward feels but I would like to know how Your Honor would feel. I could have predicted how we would feel.

Would Your Honor think that anything that Your Honor would think was inherently misleading about this would then be made self-explicit?

The Court: You answer that, Mr. Wolf. Didn't you say something about the fact that if the number of pictures was there it would make a difference. Didn't you say that, Mr. Wolf?

Mr. Wolf: If the number of pictures was there it would completely defeat the argument you have just said is not a cogent argument, and that is that it proves that we got better product than he did, because if he put in the number of pictures which shows, as I said before, that our average is way below his. And he will nevertheless argue that this figure is material, when in your view, as you expressed it, certainly ours, it is not at all.

(2909)

The Court: What is your position with respect to the number of pictures? I thought that you had said that if he put the number of pictures you have no objection.

Mr. Wolf: No, I do not say that I have no objection. I say if he puts the number of pictures it will be shown how meaningless these figures are from the

standpoint that he is arguing that they are admissible and relevant, because they will show that it is not true that the pictures that we got had anything like the average national film rental that the pictures that he got had.

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Mr. Nizer: May I make a suggestion respectfully on this, Your Honor?

So far as the defendant distributors are concerned,

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rather than Mr. Wolf, who represents Stanley, he would object, irrespective of how it comes out, to any averaging of national film rentals or gross receipts of the theatre or both between the Viking and the theatre which is 4000 seats, or between the Viking and the Randolph, but for the distributors I would say, without conceding its weight, that if he took a theatre like the Midtown, which is 990 seats, and therefore close to the Viking, which is 1017 seats, only 27 seats apart, or even the Goldman, which is maybe 100 seats difference, so it is not very large, 120 or whatever it is—but for the distributors, with the consent of my colleagues, for whatever weight it has, if he averaged the national film rentals at theatres which had at least comparability in size then I would not object.

In other words, if he wants to take the average national film rental for the Viking, compare it with the average national film rental of the Midtown, the same with the Goldman, those three theatres being in relative size of each other, and if he even wanted to take the weekly gross that each theatre averaged out over the period, so that we would get away from holidays, over the whole period—how much did the theatre get a week average? So that it takes out all of the factors of rain and whatnot and averaged it out. If he will do that for those two theatres we will

(2911)

not object, because at least we will have something that makes some sense.

Mr. Sawyer: Your Honor, I do not think you disposed of my proposition that I will put on the numbers. This other suggestion is one that Mr. Nizer certainly can do, and he is free to do, and I will include those too, there is no reason to be restrained with them, but it seems to me, Your Honor, if we put these numbers on, that the defendants' objection has been met.

Size obviously is an argument that can be made and it goes to the jury. I think that has been ruled in a number of cases that if you are comparing theatres of different sizes that is up to the jury, if you are comparing the values of different sizes.

The Court: Yes, but in all those cases they compare the individual theatres.

Mr. Sawyer: That is what I am doing.

The Court: No. It appears to me it is different. I have ruled, Mr. Sawyer.

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Mr. Nizer: Yes; but before Your Honor entertains that argument, I had promised Your Honor that we

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were going to consider amongst defense counsel a step which was in our minds in order to facilitate the trial procedure, and we have come to a conclusion, and I would like the permission, first, to state that to Your Honor before addressing myself to the question Your Honor stated,—

The Court: Very good.

Mr. Nizer: —and that is that there has developed this difficulty of Mr. Wren not having before him the documents of the defendants which he would like to refer to in giving certain kinds of testimony of comparison or otherwise, because we objected and Your Honor sustained the objection. We think that is a correct ruling.

Now, that means that Mr. Wren would have to step off and then have to come back, and Your Honor has had various applications made by both sides now with respect to that, and we thought that it would facilitate the matter and prevent the fragmentation of evidence and speed up the trial, if, so far as the documents were concerned, without for a moment—and I stress this—conceding that they are relevant, competent or material, or that any such comparisons could be made—indeed, reserving our right, with Your Honor's permission to both sides to file briefs and argue this matter—and we are ready now and we are coming closer to that to do it, perhaps by Monday morning,

(2941)

Judge, to submit our briefs as early as 8:00 o'clock, or Tuesday, if Your Honor wishes, and argue the matter—subject to our reserving our rights to protest against that kind of evidence, we wish to announce that if Your Honor should rule that he may go into such testimony, that we will waive our objection to his not having those documents further qualified from other sources—in other words, we will concede them only for that purpose—so that it is no longer necessary to await some executive from one of the defendant theaters saying, "Yes, this was the theater," and so on.

The Court: In other words, you are waiving your objection to the use by Mr. Sawyer, as he attempted, without waiving your position as to its competency,—

Mr. Nizer: Yes,. That is perfectly stated.

The Court: —the comparisons?

Mr. Nizer: Yes. That is perfectly stated.

In other words, we just had changed the timing of this thing, because we think it will speed the matter up in over-all context. While Mr. Wren and Mr. Sley are going to testify, all these matters can be determined by Your Honor, and we will have a compact bit of testimony on the plaintiff's position, instead of separated.

So I just wanted to announce that to Your

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Honor.

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Mr. Sawyer: Your Honor, it seems to me this comes a little late, this concession on the defendants' part, and I don't think Your Honor should entertain it. They were at tremendous pains, Your Honor, to persuade you that I couldn't do this.

Now we come to the end of this process and now they say, "Well, go ahead and do it; we would like to have it now."

Your Honor, I don't think that that is really quite fair. I have got the thing changed around one way, and I think that it ought to just stay that way now, and that if this evidence is going to be entertained by Your Honor, it ought to come in at the close.

The Court: Well, why don't you want to do it now? You wanted to do it initially. Now, why don't

(2944)

you want to do it now?

Mr. Sawyer: I don't want to do it now because I couldn't do it, Your Honor, when I wanted to do it when

it would have been logical as we went through these motion pictures. It was a rather handicap to me, I believe, Your Honor, to have to give the Viking's side of this thing before we got to defendants' side of the picture, but that was what was ruled.

Now, it didn't seem to me that just because the defendants now think that this will again postpone getting into the witnesses for the defendants—I mean, every possible effort, it seems to me—it is so clear, Your Honor, that moving of Mr. Sley and Mr. Wren forward from the end of the case and the one thing after another is to keep us from ever getting to the defendants' end, of their side of the thing.

The Court: Well, now, why—

Mr. Sawyer: Now, it was most inconvenient to me, Your Honor. My goodness, I had to change this case around a couple of times, and then I wanted to do it as we go through.

Now the defendants say, "Oh, well, let's do it now." I don't think I should be asked to continually change the case around to suit the defendants.

(2945)

They always say it is to shorten it. Well, of course, this is a fallacy. If it comes in one time or another, it doesn't shorten it any. In fact, it will be—at least you will have one advantage of having it at the end—by that time we will have the whole picture, and since these are comparisons, they ought to come in on the whole picture, and the same with the damages.

Now, they are the ones that wanted it this way. Now, I resisted it. I thought it was a disadvantage to have to do it. Now, again, always at the midnight hour they want to change it around back again, and I think, Your Honor, that isn't really fair to me.

The Court: Well, I think, Mr. Sawyer, that you have a point—I do, indeed—but I still am of the opinion that it would be better now to conclude all of Mr. Wren's testimony when we have these pictures in our mind. I mean, I don't see how you have been prejudiced in any way. We are now going to go ahead in the manner you thought was right. I agree with that. You are not harmed this Friday afternoon, so that you can be fully prepared Monday morning to proceed that way.

(2946)

I still think that you initially were right and the defendants were wrong in objecting to it, but I thought that I had to sustain the objection, because they were not in evidence. But Mr. Wren has testified now about these pictures, we have them in our mind so far as we can, and I think that the comparisons should be made now, since the defendants withdraw their objection.

Mr. Ward: May I then suggest to Your Honor first, that Mr. Sawyer, as I understand it, was prepared to go ahead with this line of testimony, assuming its admissibility, at the threshold of the case in the first week, and that order of proof was changed and then this morning, Your Honor will recall that you said this, and we at this table have been most mindful of Your Honor's viewpoint about it, this is what you said: That then Mr. Wren as originally intended would compare them, if competent, and he should be given the same opportunity to proceed in that fashion, after you are permitted by the defendants, because if the defendants would agree to that, that they are authentic—I sustained the objection, but if they would agree to have Mr. Wren testify now, that could be done too.

So that I would point out that, not only that, sir, but also respectfully remind the Court that it isn't a matter now of having a comparison by Mr. Wren, not until

(2947)

Your Honor has first ruled on whether or not he can testify to the comparisons. Our point is that rather than suspend that and cut it off and defer it to the very end of the plaintiff's case, the logical time for it is at this juncture.

It does not have to be done this afternoon, it can be done on Monday, but we think, for the reasons Mr. Nizer has explained, that fragmentation will be avoided, and a more congent continuity will be present in the case, and it also will be in accord with Your Honor's views as expressed this morning.

The Court: Well, we will proceed in that manner.

I will not permit you to change your mind to go back and forth this way, gentlemen, talking to the gentlemen for the defendants.

I mean it is annoying and disconcerting to Mr. Sawyer. However, I still think that it is for the benefit of the case, because then, Mr. Sawyer, when the officers of the defendants go on the stand, everything is there and the comparisons are competent, and you can compare them with Mr. Wren, and Mr. Wren has already compared them. So I think that it would be better that way.

All right.

Mr. Sawyer: I am just not clear which way Your Honor did rule then.

(2948)

The Court: Well, I am ruling that since the defendants have withdrawn their objection to the use of the authenticated documents, you can proceed as you originally intended to do—

Mr. Sawyer: No, sir.

The Court: —to have Mr. Wren—

Mr. Sawyer: Excuse me, but I didn't intend originally to proceed this way, Your Honor, I intended to do it so that it did have continuity as Mr. Wren went through.

In the first place, of course, I originally intended to proceed in an entirely different way, but aside from that, you cannot by this restore me, Your Honor, to the position I would have been in had I been able to do this in the way in which I originally intended.

The Court: Why not?

Mr. Sawyer: Well, we couldn't, because the way in which I originally intended, Your Honor, is that every time we came to the chronology of events with the Viking of what happens to the Viking on this picture and that picture, Mr. Wren was going to say: But, on the other hand, what happened was that when they got this picture, so on and so forth. You see, each time as we went through there would be this contrast.

Now, that cannot be restored, because I couldn't do it then.

(2949)

The Court: Why can't you do it now?

Mr. Sawyer: Well, I can do it now, Your Honor, but I do not see why the defendants have any right to insist that I do it now, when they were the ones who prevented me from doing it in the way I wanted to. They now stand up and say it would be more logical.

Your Honor, I submit, I hope that in this case I have not been whining about problems that I have.

The Court: I can disagree with the defendants, but I disagree with you, too, in that, how are you harmed? Just how are you harmed? How are you prejudiced?

Because if you are prejudiced and harmed I would not permit the defendants to do this.

There may be other reasons. I am alert to that. But how are you harmed?

Mr. Sawyer: Your Honor, I am harmed it seems to me because in the first place the harm that was done, that harmed me because I wanted to do it in a way that was logical then and there at the time.

Now, again, Your Honor, the harm is that I wasn't able to do it in what was really a logical way then and there.

The Court: Well, I have already ruled on it.

Mr. Sawyer: But if that is so, Your Honor, I

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am harmed because I have a certain concept of how my case is to go in, every plaintiff does, Your Honor, particularly in a long and complicated case, one has a way in which it is to be presented. This is the plaintiff's prerogative. It is very rare I think that prroof is changed around. It has been done two or three times.

The Court: Now we are talking about two different things. We are talking about, first, that you intended to call all these officers of the defendant, and then Mr. Wren and Mr. Sley. We had a brief on it. I felt there that generally the plaintiff testified, the principals testify first, that is not unusual. So I decided that. Now that is decided and we will proceed that way.

Mr. Sawyer: Right, we have.

The Court: Yes. Upon the conclusion of Mr. Wren's testimony we will hear from Mr. Sley.

Our next problem is that you then propose to use the defendants' authenticated documents with cutoff

dates, bids, and so on, and to use that information for the purposes of comparisons, as I understand it.

Mr. Sawyer: Yes, sir, step by step.

The Court: Step by step.

Mr. Sawyer: Picture by picture, and event by event, chronologically.

(2951)

The Court: All right.
Yes?

Mr. Sawyer: And then we could not do it that way. I mean they objected.

The Court: I know, but it is better to do it now than next month.

Mr. Sawyer: Of course, that cannot be done now, Your Honor, because to do that, of course, would be to take Mr. Wren back at the beginning again and have him testify again as to exactly what happened to the the Viking Theatre.

The Court: All right. What will happen next month, then? You would have to do the same thing.

Mr. Sawyer: No, Your Honor, I say this we can never do now because it would be objected to as repetitious. I cannot again put in the Viking situation in order to compare it, step by step, so that the only thing left then would be certain of the generalized over-all comparisons which I think fit in very closely with the damage evidence. They are not the same, but they fit closely together. That is, you make these generalized statistical comparisons.

The Court: What I cannot understand is, this is something that you wanted to do. So how are you harmed?

Mr. Sawyer: Well, because, Your Honor, I wanted

(2952)

to do it then, because I had one concept of the case. First of all, they changed that concept, so I adjusted myself to that. Then we came along and I wanted to do it with Mr. Wren because that was the concept I had of the case. Now for two weeks or more, Your Honor, I have adjusted all of my notes, all of my thinking, what I am going to ask and what I am not going to ask, on the basis of the whole picture, but I can't do that because I can't use material from the other side, and I was just in the trend of thinking, well, now, so-and-so from the defense is being called as a witness and that should be brought out from him. I mean it is a physical matter, Your Honor. You are on trial every day, you have a certain number of hours thereafter, and you have to have things arranged in terms of the way this case is laid out.

Now again at the zero hour, Your Honor, always at the exact last minute, I would supposedly be starting on this afternoon or Monday morning again with a little different way of changing it around.

Now, there is some virtue—

The Court: You say a different way. It is not a different way. It is the same way that you contemplated.

Mr. Sawyer: Two or three weeks ago, yes, sir, but since that objection was made, since the day Mr. Wren took

(2953)

the stand originally—how long was that? Over two or three weeks, perhaps. Since the day he took the stand then, in accordance with Your Honor's ruling, I have changed my concept completely, I have changed it

around utterly. I have done all of the planning that I had to do in terms of how this evidence was to come in and it has been changed around. As a matter of presentation, because it suits the defendants' pleasure to withdraw this objection, which they pushed so hard, then I have to change everything around again. Now I would like to tell Your Honor why that, having done that, there is at least some advantage to be gained in terms of lucidity and in terms of making it clear, in putting the thing at the end, and that is that damages—let us just take damages for a moment: Certainly damages should come at the very end, when everything is in, because damages are based upon the entire presentation of the case. There wouldn't be a foundation for them until everything is in. So that in any event Mr. Wren should come on, or whoever I would have, at the very end on Schedule A, because Schedule A is the pinnacle which is built upon the entire case presented by the plaintiff up to that point—well, not up to that point, it would be the entire case, too, it would be the last thing.

(2954)

Now, this material, I submit, Your Honor, would fit in most logically with the damages, that it ought not to be again changed, I think, at the defendants' pleasure, unless, Your Honor, they have a right, having taken the position, that they actually have a right as defendants to insist on this ruling. I mean just for their convenience, because they say, we would like to have it, I do not think that they should have it.

The Court: Oh, no, they do not have the right to do that at all.

Mr. Sawyer: Well, they do not, Your Honor.

The Court: I have this question. I can easily say, they made a decision and they should abide by it.

Mr. Sawyer: Well, I think that is what Your Honor should say, in all fairness.

The Court: But I do not want to do that, Mr. Sawyer, because I think really we have the pictures and if Mr. Wren does it now or he does it a month from now he has to do the same thing.

Mr. Sawyer: Well, he has to do the same thing, Your Honor, but—

The Court: He has to take picture by picture. He did not get this, they got it.

Mr. Sawyer: That is water over the dam, Your Honor, we would never take picture by picture. The opportunity

(2955)

I had to do that was I think irrevocably lost when Your Honor ruled that I could not use this defendants' material when Mr. Wren was on, because, you see, to do that again would so greatly prolong it, I would not even ask Your Honor to reconsider that. That would mean that Mr. Wren would have to start at the beginning and virtually testify almost to everything he did on direct about the Viking and then make any comparisons for contrast he wanted. Of course, it wouldn't be on every picture anyway. Now, that they would object to as repetitious and I would think that, too.

The Court: Well, I would not permit it.

Mr. Sawyer: That is what I mean. So this wouldn't do either now or at the end. What we would do would be by way of summary and generalization across the whole picture.

I just say to Your Honor that if Your Honor directs me, of course, I will come in and I will do it Monday,

but what troubles me, Your Honor, is that I just think that unless the defendants have some right to ask this of Your Honor, and that there is some right that they have to now withdraw this, that ordinarily the issue is on the other foot.

Ordinarily, the plaintiff proceeds and puts on his case as in the order that he sees fit. Now they change it around.

(2956)

The Court: Aren't we at the original thing all over again?

How do you answer this, Mr. Nizer?

Mr. Nizer: I think it has been answered. Your Honor has ruled. I think the evidence is clear on this matter.

Originally Mr. Sawyer was ready and on the 14th day of the trial—pardon me.

Was it the 14th or the 10th?

On the 10th day of the trial, when this matter came up Mr. Sawyer said at the bottom of page 1414:

> Whatever Your Honor's pleasure is on that, I would abide by it, and I could do it either way. I could put it in now, if you will permit me to, or at the close of the case.

And then he said he would put it in after or at any other time.

This claim of inconvenience it seems to me, as Your Honor has indicated, falls without any merit at all in view of the fact that if he does it later, whether it is a week or a month later, it will be just as inconvenient as it would have been the first week if he had done it.

The pretense that he has to go back over his direct is also not true.

(2957)

This is a situation merely in which he has a witness on the stand. We are trying to get through with that witness as much as we can. It would seem to me that would be the mutual desire of everybody. There is no trial advantage for anybody in fragmenting it and we are not seeking any trial advantage, and I would think that as Mr. Sawyer indicated originally, I will do it either way, now or later, it didn't matter much, and since Your Honor this morning, as Mr. Ward indicated, suggested that perhaps we could have speeded up this thing and have it all at the same time, when the evidence is fresh, we held a meeting on that and decided to do so.

There was objection to that in some quarters from a trial viewpoint, and I am not going to point out the reasons for it, the disadvantages for us. There are often difficulties with respect to whether defendants should ever give him this material. In some companies he hasn't even called the executives of that company to testify. And we have had some difficulties with this in our own ranks, but we agreed to give this in a sincere and bona fide effort to round out the testimony of one of the main witnesses and get rid of one phase of the case so that we could consider some others, and I want to say here in conclusion, thinking that Your Honor will abide by your decision, made several times on this matter by now, that I hope that in the course

(2958)

of this discussion, in which we talk of when he makes comparisons, that I know Your Honor does not intend thereby to prejudge the ruling that there should be no comparisons, that this whole matter may be academic.

We insist that the kind of thing Mr. Sawyer has in mind will not be pertinent or relevant or competent, and we think this whole matter may fall as a matter of

an academic issue in any event, and I am sure that in the course of discussing this, when we say you will do it later or today, you don't mean thereby to prejudge the decision.

So I think, if your Honor will permit me to, I will assume that Your Honor adheres to the ruling, and I would like to go on with the other matter that was before us before the noon hour.

Mr. Sawyer: Would Your Honor first make a specific ruling?

Let me point out this, if you will, Your Honor.

There is one additional difficulty, and that is that we haven't had all of the Viking cast, we haven't had Mr. Sley.

Now, will this material, if Your Honor directs Mr. Wren to go on with it now, would it include comparisons with respect to motion pictures that we have not heard about yet? Because, you see, we had to put Mr. Wren on first and he has

(2959)

only told us what happened since he came with most things. Now, he has put in some stuff from the record, but he hasn't put in—we don't know, for instance, anything about the circumstances under which BETRAYED or STUDENT PRINCE—

The Court: Well, they were only a few pictures, weren't they?

Mr. Sawyer: No, you see, Mr. Wren did not come until HIT THE DECK, that is in January of 1955.

Mr. Goffman: Six before HIT THE DECK.

Mr. Sawyer: Six pictures before HIT THE DECK.

The Court: Will you object to those six pictures, Mr. Nizer?

(2960)

Mr. Nizer: If the matter comes up, he has no knowledge of any, in any event, I don't believe he would be able to testify. He wasn't there. But if Your Honor overrules our objection, by all means let him do it at the same time subject to our objection. In other words, if Your Honor rules that he can make these comparisons, the question will then be whether he can make them for pictures that he didn't bid or negotiate for. But if Your Honor overrules us, we will have no other objection except his competence to do it.

Mr. Sawyer: How about all the bids that were made during that period that Mr. Wren didn't make it? It is not just the six pictures we played but all of the bids that were made during this early period.

Mr. Nizer: There were four.

Mr. Sawyer: That is a problem.

Mr. Nizer: They will be in, four of them.

Mr. Sawyer: I just don't know. I just want to get the ground rules clear, Your Honor, because we get up there and the first thing you know it won't be able to be testified to because of—

The Court: If you want Mr. Wren to be completed, you should waive any objection to his testifying as to the four.

Mr. Nizer: We do.

(2961)

The Court: That Mr. Sley himself had experience with.

Mr. Nizer: We do. I was just thinking of that.

Mr. Sawyer: Not to the four, Your Honor—I don't know whether there are four or not—to any events, transactions, occurrences of whatever sort or nature before Mr. Wren took over that are pertinent to what they want Mr. Wren to testify to now instead of later.

The Court: That is pretty broad.

Mr. Sawyer: That is what I have to do, Your Honor, because there will be more objections.

Now, we better get this straightened out.

The Court: I rule this, and I think it is a matter for my discretion—I appreciate the fact that it comes, well, not with some surprise but at a late date, but I still don't see how you are harmed in any way because whatever you have to do with respect to going over ground with Mr. Wren now or starting Monday—I won't insist that you do this until Monday—you would have to do again if Mr. Wren is called back two weeks or so hence, and also that that was your desire, so therefore, you must have been prepared to proceed that way and under the circumstances I think that while

(2962)

we have it fresh in our minds we ought to proceed now.

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(3022)

The Court: Gentlemen, I have had an opportunity, as you know, to review this whole question over the luncheon recess, which I did entirely, except eating a sandwich at the same time, so that I had opportunity to review the cases and my ruling before the argument, but I did want to hear the argument because I was concerned, as I said initially, as to the problem dealing with testimony as to other pictures not bid upon by Viking.

I have considered further the briefs. I have reviewed my notes. I have reviewed my notes particularly which I made before I ruled, and my ruling, of course, appears in the notes of testimony, and as a result of considering the additional arguments which were very able, and, here again there are no cases either way, I restate, on this particular point, it makes it very difficult to decide.

However, my ruling is that I will sustain the

(3023)

objection of the defendant Goldman. I believe that is the way the question was raised. I adhere to my ruling previously made.

My ruling now is that testimony should be restricted to the 75 films bid by Viking.

I do. that because I feel that Viking complained about the fact that he is damaged in that he bid for 75 films but for reasons, very aptly stated by Mr. Sawyer and very earnestly, that he was deprived of the pictures.

Now, if he couldn't prove that, as to any of those 75 pictures, but did prove it by other pictures, it seems to me he would be out of court because he has to establish his claim based on the pictures he was deprived of.

He couldn't be deprived of anything that he didn't bid on.

It is true that Mr. Sawyer has a client, and I am troubled again about that problem of pattern. Now, Mr. Sawyer wants to show that Mr. Goldman got a percentage higher of pictures he bid upon than Viking did, apart from the 75 films.

I agree with Mr. Nizer in that it seems to me that if the plaintiff were able to show that, as he said, I was not permitted to have a screening of some picture that he never bid on, but somebody else screened it, that is some-

(3024)

thing there because that might be considered as being conspiratorial conduct, where he was prevented actually from bidding on that particular picture. But where he had the full opportunity, as anybody else, and did not bid, then if he wants to show that—as I said, Mr. Goldman got 9 of 11—then you do open every picture, as Mr. Nizer said, then they would have to give reasons why every one of the 9 was awarded to Mr. Goldman, from the various reasons that he said and I would not repeat.

The same way with adjustments. Why, you would be able then, Mr. Sawyer, as I see it—perhaps I am wrong—to show adjustments with every picture exhibited by first-run theatres, 12 of them in Philadelphia, during the period of this suit.

It seems to me that you can't show—and we are talking about Mr. Goldman. Let's talk about Stanley Warner—that on pictures that you did not bid on, Stanley Warner got adjustments on every one, whereas pictures that you bid on you got only adjustments on 10 out of the 75.

I don't think that that is competent evidence because there may be other reasons, particularly in this industry, like advertising. I think I mentioned adjustments, or cash guarantees, or playing time, you would then seek to have testimony as to all of that, and for what purpose?

(3025)

After all, as I said, that has to be shown with respect, in my judgment, to the 75 films, and if it can't be shown with respect to the 75 films, then you have no case, as I see it. I am not ruling on that problem or I am not taking that position. All I am ruling on is that the testimony will be restricted to the 75 films which the Viking bid for.

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(3026)

NINETEENTH DAY

* * *

(3028)

(Argument in the absence of the jury.)

The Court: Gentlemen, who proceeds on this question?

As I understand it, we are arguing the question as to the admissibility of the comparison of bids as proposed by Mr. Sawyer. That is so, is it not?

Mr. Sawyer: Yes, sir.

* * *

(3035)

This is a matter, I think, of weight in any event, but let me make it clear to Your Honor that we would concede that no distributor can in each and every individual instance correctly project without any possibility of error the offer which is necessarily the best since at that time the gross is not known. On the other hand, we contend that if consistently superior bids are rejected that this gives

(3036)

rise to an inference that they are not acting in accordance with their best economic interests because if they were, it would be normal to suppose that those people who are officials of the defendant-distributor companies and whose duty it is to evaluate bids and make these decisions would use what the defendants call the hindsight test at some process during the course of the suit. In other words, if this is a complicated thing and difficult to decide, one would presume that after some experience had been acquired, namely, some time had gone by and the people who were in charge were anxious to obtain the best bid, that they would go back

and say to themselves, "well, how would we have done if we had awarded this last picture or the one before that to the Viking?" They would look back, in other words, at a time when they are now supposedly considering another Viking bid perhaps of such similar terms whether or not they would have done better in the previous instance where they rejected a Viking bid and that they would make that comparison and they would also make a comparison with respect to pictures that they had awarded to the Viking as compared in case where others bid.

Now, that is our proposal, Your Honor. We think that it is sanctioned by the cases in this field specifically, that it is sanctioned by the general principles of antitrust litigation with respect to whether or

(3037)

not people acted contrary to their economic interests and it is generally sanctioned in terms of it being a natural feature of an antitrust case to examine into business conduct in the context of whether or not it was done by reason of best economic judgment or pursuant to an attempt to discriminate or to conspire.

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(3087)

I also would point out to Your Honor that it isn't merely a question of saying and weighing whether or not in a given instance their business judgments were wrong. If that is all the question were, we would have, I agree, no case. It is only when you get an over-all pattern of rejection that it has weight and that doesn't require this judgment back and forth, and I might say Mr. Wren will make no valid judgments in his testimony. He will not testify why he thinks his bid is better. He will do no such thing. He will simply apply to the grosses achieved at the other theatres—as I say,

in almost every instance, lower than grosses that we achieved—the terms that he offered the same as he does when he makes up his returns on movies he gets. It requires no judgment on his part. It doesn't require him to argue about his bid being better.

(3088)

He simply makes this application and the results speak for themselves.

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(3099)

The Court: I am about to rule on defendants' objection to the introduction by plaintiff of evidence relating to the rejection of superior bids and the acceptance of inferior ones, as claimed by the plaintiff.

As I see it, defendants object really to the proposed manner of proof.

Under the complaint and the pretrial orders in this case, plaintiff may certainly attempt to show that there was discrimination against them in the allocation of films—that the allocations, that is, were not on the basis of the better bids—provided that the evidence they submit on that point is otherwise admissible.

The thrust of the objection, quite clearly, is that it would be improper to allow plaintiff to attempt such proof by figures and tabulations purporting to show what the film rentals would have been if Viking had been awarded films (on which it bid) which were in fact awarded to other theatres, and based upon the box-office results of the other theatres.

It is unnecessary to repeat the illustration attached as an exhibit to plaintiff's brief filed on May 26, except in summary form, to show what the plaintiff attempts to prove as a matter of evidence.

(3100)

THE BRIDGES AT TOKO-RI was awarded to the Randolph Theatre, at rentals of 50 per cent for the

first week, then 37½ per cent, then 32½ per cent, 25 per cent, and 25 per cent for successive weeks thereafter—without written guarantee. The Viking had unsuccessfully bid: First three weeks 50 per cent, and 40 per cent thereafter, with $22,500 written guarantee. The picture grossed $90,000 at the Randolph, resulting in $35,000 rental—round figures. Assuming the same gross, the rental would have been $44,000 had the Viking bid been accepted—says the plaintiff's tabulation.

Defendants say it is almost as absurd to make this comparison, since the Randolph is two and a half times as large as the Viking, as it would be to compare Viking figures with those of Radio City Music Hall.

The matter has been fully argued before this Court; counsel have submitted a number of briefs which the Court has had opportunity again to consider over the weekend, and on that basis the Court is now in a position to make its ruling.

Rather than repeat the briefs and arguments, it may be said summarily that no one could say that the Court's attention has not been called to practically all possible objections.

(3101)

The proposed evidence, say the defendants, is incompetent and improper for the jury to hear because its probative value is very slight in proportion to its vices in that: It invites speculation by the jury; would tend to be evaluated improperly by the jury; would tend to distraction on collateral and tangential matters; will unduly prolong the trial; and other reasons. In addition it is argued that the award of licenses is a matter not to be understood by laymen; that the distributors themselves are the only ones capable of understanding and employing the appropriate criteria for evaluating bids; that the award of licenses is a matter of business judgment not to be challenged by hindsight;

and that the business choices made by defendants in awarding the pictures were made, however, on expected or apparent boxoffice quality—without benefit of hindsight. Instead, say the defendants, the plaintiff's projections of what-might-have-been disregards differences in theatre locations, management, exploitation techniques, seating capacity, as well as many other intangibles.

It is the ruling of this Court that those objections go to the weight, but not to the admissibility of the evidence. They do not stand in the way of admissibility, and the objections, therefore, will be overruled.

(3102)

In Paramount Film Distributing Corporation vs. Village Theatre it was shown that higher offers of plaintiff theatre had been ignored by the one defendant. Defendants point out that the foregoing case was grounded on discrimination by Paramount against this one particular plaintiff theatre because it was a suburban theatre. It may be conceded that the theory of that case differs from the present one. However, few cases are entirely similar, but I view it as authority for the present ruling. Of course, the problem is not free from doubt in any way, as there are no cases exactly in point.

The proposed evidence seems admissible, and the suggested weaknesses of the testimony and tabulations, which the Court notes are of considerable weight, are, of course, proper matter of rebuttal and argument by the defendants thereafter.

Accordingly, as I have indicated, the objection is overruled, and the testimony is ruled competent.

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(3121)

Mr. Sawyer: Let me make myself clear on that. For the purpose of this comparison, I am assuming we

would have played the picture at approximately the same time. I am not asserting—this witness is not asserting—

(3122)

that in each individual case he could have played all of these movies at these particular times. Do you follow the difference between the two?

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(3123)

JAY WREN (Resumed).

RE-DIRECT EXAMINATION (continued)

By Mr. Sawyer:

Q. Now, Mr. Wren, do you recall testifying in response to questions asked you by me on direct examination in connection with the advertising arrangements made between the Viking and Loew's, that you were asked this question:

"Q. Is it the custom in the licensing of motion pictures for the distributor to pay advertising, all advertising on a 90-10 deal?"

And you answered:

"A. It is."

Do you recall that?

A. Yes, sir.

Q. And then do you recall being cross-examined at some length by Mr. Nizer as to whether or not you knew of any contracts, specific contracts, first-run Philadelphia, where there had been, the distributor had paid all advertising on a 90-10 deal?

A. Yes, sir.

Q. And we had a discussion about custom and rumor?

A. Right, sir.

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(3126)

Mr. Sawyer: Just a minute, please.

And now, Your Honor, I offer to show a number of contracts with this distributor, not some other people, all Metro-Goldwyn Mayer, all those with various first-run downtown Philadelphia exhibitors in which they paid all advertising on 90-10 deals. Therefore, it tends to—it is redirect, because it tends to counteract the inference sought to be drawn by cross-examination now here that there weren't any.

Mr. Nizer: The reason that it does not counteract anything is that the issue at all times, while at the time that he made this deal, and he said there was a custom at that time: Did you know of any such deal or contract prior to that time or up to that time?

It was clearly posed to the date about which

(3127)

he testified there was a rumor at that time.

In subsequent years there were some contracts—we conceded it at the time—and now we bring some in. Even those contracts, as isolated instances, do not show a custom, but they are totally irrelevant about the question about which he was asked and about which I cross-examined, which is, on what do you base this custom at the time you made this deal?

And if he has a contract prior to that date, I will not object; if he has a contract subsequent to that date, except I will object on the ground it is isolated but not on the ground I now object, if he shows contracts subsequent to that, it doesn't meet the issue at all, and if Mr. Sawyer will be good enough to give me the page from which he is referring, I will demonstrate that that is so.

Mr. Sawyer: 827.

Mr. Nizer: Now, on cross-examination, which is—

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(3128)

Mr. Nizer: Page 1844.

"Q. In 1955, when you were dealing with Formato, Formato told you it was the custom in the industry for the distributor to share the expense with the exhibitor in the 90-10 deal. Is that what you are testifying to?"

In other words, he claimed that Formato told him something in February, 1955, was a custom. Now, if he has any deals prior to February, 1955, I will not object.

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(3129)

By Mr. Sawyer:

Q. Mr. Wren, I show you a contract for the exhibition of the motion picture RHAPSODY obtained from the defendants. Who was the distributor of that motion picture?

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Q. Now, Mr. Wren, who is the distributor of that motion picture?

A. Metro-Goldwyn Mayer.

Q. Is that Loew's?

A. Well, Loew's, Incorporated.

Q. Is that the company for which Mr. Formato works?

A. Yes, sir.

Q. And what is the date of that contract?

A. 3-12-54, March the 12th, 1954.

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(3131)

Q. Now, what is the advertising clause in that contract?

A. Distributor to pay for all advertising in connection with the engagement of this picture.

Q. And what kind of terms is that contract?

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(3132)

A. The terms are indefinite run, distributor to receive 90 per cent over $2600 for each week. Length of run is to be determined—

Q. Well, just that, 90 per cent.

A. All right.

Q. Now, what was the advertising provision?

A. Distributor to pay for all advertising in connection with the engagement of this picture.

Q. Now, I now show you a contract, Mr. Wren, for exhibition of a motion picture and I ask you what the distributor company is in that case.

A. Loew's, Incorporated.

Q. And what is the picture?

A. THE GREEN FIRE.

(3133)

Q. And what kind of a deal is it?

A. Indefinite run, $30,000 guarantee.—

Q. No, I don't care about that.

A. —against 90 over $2600 for each week.

Q. 90-10 deal?

A. Yes, sir.

Q. Now, is there an advertising clause in that contract?

A. Loew's—

Q. Is there an advertising clause? Is there a clause with respect to who will pay for advertising?

A. No, sir.

Q. Now, I will now show you a letter, sir, from the files of the defendants and I ask you to whom that letter is addressed.

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(3134)

Q. Read the whole letter, would you, please.

A. "December 16, 1954

"Mr. Joseph Ingber
"Brandt Theatres
"1555 Broadway
"New York 36, N. Y.

"Dear Joe:

"With reference to your letter of December 14th regarding GREEN FIRE, we omitted the clause pertaining to advertising purposely. We do not want a clause inserted in the contract stating that Loew's will pay for all the advertising, inasmuch as we have never done this in the past, except for the engagement of RHAPSODY which played at the Translux Theatre. It is understood, of course, that we will pay all advertising expenses connected with the engagement of GREEN FIRE.

"Best personal regards. Sincerely,"

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(3135)

Mr. Nizer: And may the record please show—I think Mr. Sawyer will agree—that both of these refer to a non-defendant exhibitor, the TransLux; is that correct?

Mr. Sawyer: That is right—Brandt Theatres.

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Q. I show you a contract, Mr. Wren, for the exhibition of the motion picture CAMILLE. What is the distributor of that

(3136)

motion picture?

A. Loew's, Incorporated.

Q. And is there an advertising clause in—what kind of a deal is it, Mr. Wren?

A. A 90-10.

Q. And is there an advertising clause?

A. No, sir.

Q. Now, I show you a letter on the letterhead of Metro-Goldwyn Mayer and I ask you to read that letter, please.

A. It is a letter to Mr. William A. Madden, Philadelphia, Pennsylvania.

"Dear Mr. Madden:

"In keeping with my telephone conversation with you today it has been agreed with the Brandt Theatre Circuit that they will exhibit CAMILLE in the Trans-Lux Theatre, Philadelphia, opening either February 4th or February 8th. A definite date is to be confirmed to the writer by Mr. Brandt either today or tomorrow.

"The deal will be 90/10 over a house expense of $2,700. We will pay all advertising with the definite provision that the engagement must be sufficiently successful to provide film rental enough to pay it. Otherwise the Brandt Circuit agrees to assure the ad-

(3137)

vertising costs.

"Regards.

"Sincerely,"

And it is signed by J. P. Byrne.

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Q. And finally this letter, Mr. Wren.

"Mr. Lou Formato

"Metro-Goldwyn-Mayer Pictures

"1233 Summer St.

"Philadelphia, Pa.

"RE: TRANSLUX, PHILADELPHIA"

It is dated February 17, 1955.

"Dear Lou:

"Confirming our telephone conversation, it is understood that the deal made on CAMILLE was 90%

(3138)

over $2,700 for each week, with the Distributor paying for all advertising in connection with this engagement.

"You will note on the attached contract, that you have eliminated the clause pertaining to the advertising. You have agreed with me over the phone that, although the contract does not stipulate so, Metro will pay for all advertising.

"Kindest regards.

"Sincerely yours,

"JOE INGBER."

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(3139)

DIRECT EXAMINATION

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(3170)

By Mr. Sawyer:

Q. Mr. Wren, you testified that you sought to motion the license picture BRIDGES AT TOKO-RI.

A. Yes, sir.

Q. Who was the distributor of that motion picture?

A. Paramount.

Q. Did you put in a written bid for that motion picture?

A. Yes, sir. We did.

Q. Now, where did the picture play, Mr. Wren?

A. At the Randolph Theatre.

Q. Have you examined the cut-off cards or the records of William Goldman, Theatres, Incorporated?

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(3171)

Q. Have you examined, Mr. Wren, the records of the Goldman Chain to determine the gross obtained by any motion picture and the film rental paid the distributor therefor?

A. Yes, sir.

Q. And with respect to that motion picture, what was the gross obtained at the Goldman Theatre for its exhibition?

A. At the Randolph Theatre? Ninety thousand—

Q. At the Randolph Theatre. Excuse me.

A. $90,479.86.

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Q. And how much film rental was paid to Paramount for the exhibition of that motion picture?

A. $35,363.59.

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(3172)

Q. When did the picture play, Mr. Wren?

A. From the 20th of January, 1955, to the 21st of February, 1955.

Q. All right, sir; now, what terms, what percentage terms did the Viking offer?

A. First three weeks, 50 per cent, and 40 per cent thereafter.

Q. Now, sir, if the picture had played at the Viking Theatre, had been awarded to the Viking Theatre and if this gross had been achieved, what film rental would have been paid to Paramount by the Viking Theatre?

A. $43,613.46.

Q. Now, was there a written guarantee offered by the Viking Theatre?

A. Yes, sir.

Q. What amount?

A. $22,500 guarantee.

(3173)

Q. Was any bid, oral or written, received by Paramount from the Goldman chain, from the Randolph Theatre?

A. No, sir.

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(3177)

Q. How much more film rental would have been earned by the Viking under these circumstances?

A. The Viking would have paid $8,249 more film rental to the distributor than did the Randolph.

• • •

The Court: Now, members of the jury, as you know, I had a lot of problems and you heard part of the argument this afternoon that I have limited the plaintiff to the 75 or 80 pictures that it bid upon holding that they couldn't claim damages for any discrimination so far as any pictures they didn't bid upon. Obviously, they can't

(3178)

complain if they didn't try to get the picture. Now, they can complain if they show to your satisfaction that they did try to get the picture but because of some discrimination it was not awarded to them.

Now, as I said, I have limited that inquiry to the 75 or 80 pictures on which the Viking bid and you have heard a lot of testimony as to that and it will be argued again to you.

Now, the problem that I considered over the weekend and decided just before noon today was this problem: Plaintiff claims that he was discriminated against. Now, he says, "I am going to show you as part of the evidence that I gave superior bids to the distributors but they ignored my superior bids and awarded the picture in some cases to Goldman or Stanley Warner,"

so the problem is how can it, the plaintiff, show what is superior and what is inferior as a bid? Obviously, if it, say, was this glass and somebody, Stanley Warner, said, "Well, I will give you, Judge, 15 cents for it," and Goldman says, "Not worth that; I will give you a dime for it," the superior bid obviously is 15 cents and if I awarded that, sold it for 10 cents, it would be one piece of evidence to indicate that I was not serving my best judgment. Why should I do without the 5 cents that I could otherwise have gotten? So we come back

(3179)

to the problem, what evidence is competent for the plaintiff to show that his bid was superior and the picture was awarded to one of his competitive theatres for an inferior or a lower bid.

I have ruled after a lot of consideration that I would permit the plaintiff to show you his method of comparison and he has shown you, of course, a lot of films he got so you won't be considering that; you will only be considering his method of comparison, again, I repeat, in his theory of the case—and you will hear from the defendants, of course, and from me—that the bids were superior because he says, "I should be permitted to show it." As a matter of law, I have to decide first of all whether he can even mention it to you. I have decided that he can.

Now, what has he shown? With this picture, THE BRIDGES, he has shown that it grossed at the Randolph a certain amount and under the negotiated contract, I don't think this was a bid, and that is another one of the plaintiff's complaints that you will hear about more throughout the trial, that under the negotiated contract, the distributor, Paramount, had with the Randolph Goldman Theatre, that Paramount got $35,363.59 from its film rental and it played for five weeks.

(3180)

While it is not necessary that you get all of the facts yet, it is important in a measure that with Randolph, Randolph agreed to pay Paramount 50 per cent of the gross receipts the first week, 37½ the second, 32½ the third, 25 and 25 whereas Viking said to Paramount, "Well, now, you give us this picture; we will pay you for the first three weeks 50 per cent and 40 per cent thereafter," so that the percentage was higher and that is computed at $43,613.46.

So that still repeating the plaintiff's position and to make it clear to you, the plaintiff says, "Now, look, Paramount got less, got $8,249.87 less from the Randolph than Paramount, the distributor defendant, here would have gotten if Paramount had taken our bid because if they had taken our bid, it was $43,000," so there that proves according to their argument that Paramount took the inferior bid and ignored their superior bid and the plaintiff argues why. Now, that is something for you to determine.

When I ruled that I would permit you to hear it—and you will hear about all these pictures—I said to the attorney for the plaintiff that while I was ruling on its admissibility—that means that you can consider it—yet I was going to say to you that in my judgment it is up to you in the final analysis, but in my judgment, I am clear

(3181)

as to the weight of this testimony, that it is not too weighty for you to consider—that is my judgment—and it is for you to decide, but, you see, we have a theory of law, and I will charge you eventually about it, that some evidence weighs harder than evidence which opposes it. That means it comes with more credibility, it comes with a greater force, a greater worthiness. Do you see what I mean?

In other words, can I explain it this way: Suppose we have a scale. Now, evidence that has much weight, it goes like that, but evidence that has little weight might just tip it a little bit that way. Do you see what I mean? Naturally, if somebody was going to give you a rib roast and it went like that, you would take that one, wouldn't you, because it would weigh more, whereas if you just took one like that, why, you would discard it. You would say that wouldn't even be worthwhile for me to cook. Now, that's the idea.

Now, this is law, but I think it is important. I am cautioning you as to the weight, the consideration you are to give in this case.

Now, it is obvious, it will be brought out by the cross-examination of the defense that the Randolph is two and a half times the size of the Viking. Can you compare the two? It has, I don't know how many more seats

(3182)

in it, but at least twice as much. It is down on Chestnut Street where, around 12th Street, some place like that. The Viking is up at 19th and Chestnut. Then, the plaintiff is assuming that if the picture played at the Viking it would get exactly the same gross of $90,479.86 as it got at the Randolph.

In other words, there is a great deal of uncertainty as to it. I have permitted it to go in because, you see, there are never two theatres exactly the same. They can't be located in the same spot because it would be the same theatre and so, therefore, we don't know for a certainty whether it is reasonable or likely that the Viking could get the same gross of $90,000 as at the Randolph. Now, that's uncertain.

You have comparisons as to the approximate playing time. Now, if there is a difference in the playing time, that has to be considered because, naturally, if it

is a holiday, why, you are going to get a bigger gross than otherwise. I think we have mentioned that to a certain extent.

Then, on the bidding, as I said, it is not like that glass. We have already heard testimony that apparently in the motion picture industry they bid sometimes on percentages, guarantees, advertising, adjustments, and so

(3183)

on. Now, there isn't any doubt about the fact that the law is that a man who is in business, say, can make his own judgment even though it is a mistake because a lot of businessmen make mistakes just like a lot of judges including this one, but the law is that a businessman can make a mistake, but if he makes it too often or if there are other circumstances involved or if there is fraud or if there is a combination, I am going to talk to you later on. Whether it has been shown, the plaintiff hasn't finished his case so therefore we can't talk about that at all although I may talk about it later on.

Now, let me see. What else impelled me to discuss the weight of this evidence? With those figures, you are looking back, you are looking back to the distributor who says, "Yes, that's right, sure." The distributor, Paramount, agreed with us all. They will say, "Sure, no doubt about that, it would have been better for us to give that picture to the Viking."

Mr. Nizer: No.

The Court: No, not necessarily.

Mr. Nizer: It couldn't gross that, Your Honor.

The Court: Well, I mean, assuming all factors are even, and I agree that that was not a correct statement, but the reason I mentioned that was that in hindsight, it some-

(3184)

times, is easier to say, "Well, now, that should have been my decision," than in foresight. In other words, we could all look back on our own experiences and after a couple of years have gone by, when we make a decision in business or otherwise, we can say, "That was a terrible mistake," but as projected into the future, well, we don't know. We have to take a chance. There is no way in which particularly here certainty could be applied to say as to right then which bid between Randolph and Viking was the better one. As a matter of fact, I think Mr. Wren himself testified that everybody takes a chance. You select one that you think and bid as much as you think it will be successful in your theatre, but nobody knows.

That is right, isn't it, Mr. Wren?

The Witness: Yes, sir, we bid.

The Court: Yes, that's right. When you bid, nobody actually knows, although everybody has an opinion.

Now, then, let's see. Well, the availability of the picture, some of these things, of course all of them will be related to you, skill of operation of the theatre, the type of picture, and so on. In other words, even though sometimes there is a lower percentage, the distributor might think that, "Well, I am going to gross more because it is a bigger theatre." I mean, there are a lot of things that

(3185)

might be considered although Mr. Sawyer will say that that doesn't mean a thing. I think you have already heard him say that and you will hear more about it, that the size of the theatre doesn't mean a thing.

Now, of course, here, as I said, this happens frequently, you are called upon to really evaluate on the

picture. In the final analysis, you are going to have to determine whether these were superior bids or not. You are going to be a motion picture distributor and an expert, but that is not unusual, members of the jury, because frequently in this court, you have two doctors who testify and you are not doctors and neither am I, but the jury has to determine which is right, so therefore they are going to be the doctor. One doctor says "White"; one doctor says "Black." The jury says either "Black" or "White," so the same thing is here.

I suppose another reason is that it would unduly prolong the trial, but I am doing that right now.

Is there anything else?

Mr. Ward: Your Honor, I think Your Honor quite inadvertently made two statements that I would—

Mr. Sawyer: Can we have this at side bar?

The Court: Yes.

Mr. Ward: —that I would ask leave to correct.

(3186)

The Court: Very good.

(Discussion at side bar follows:)

The Court: By the way, Mr. Sawyer, you have an exception.

Mr. Sawyer: Thank you.

Mr. Ward: First of all, Your Honor, I would simply call Your Honor's attention to what was doubtless an inadvertence when in addressing the jury you mentioned the fact that by the application of this line of reasoning Viking would have earned a certain amount of money. I would suggest that it might be a little more accurate to say to the jury that by the application of this mathematical formula, using the terms of the Vik-

ing bid and applying them to the results achieved by the competitors, the result would come out to this number of dollars as distinguished from the use of the term "Viking would have earned." That may be a technicality but I think it is a realistic observation.

(End of discussion at side bar.)

The Court: It has been brought to my attention that maybe inadvertently I said something about, "Well, the Viking would have earned this gross." Well, of course, I

(3187)

didn't mean that the Viking would have earned anything. The gross receipts at the boxoffice would be that assuming that the Viking gets the same number of people and the same charge per seat as the Randolph. In other words, Viking didn't earn this. There is nothing there about earning in any way because, naturally, we know that you have to take off the film rentals and expenses of operation.

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(3192)

The Court: Members of the jury, it has been suggested that you might confuse those figures by saying, "Well, the film rental at the Randolph is $35,000 and at the Viking $43,000, that there was a loss of $8,000 to the Viking." The plaintiff doesn't contend that in any way, shape, or form. Naturally, he couldn't. That's not presented to you for that purpose. I am sure that you realize that, but it was suggested I make that clear, and the reason I am saying it is because you are going to hear picture after picture on this basis. It has nothing to do with damages.

Am I right, Mr. Sawyer?

Mr. Sawyer: Absolutely clear.

The Court: The only evidence it is submitted for is to show what you contend to be a superior bid which

(3193)

was rejected by the defendant.

Mr. Sawyer: This loss here to anybody would be to Paramount, not to Viking.

The Court: Yes. Very well. All right.

By Mr. Sawyer:

Q. Now, Mr. Wren, the next motion picture I invite your attention to is the motion picture COUNTRY GIRL. Who was the distributor of that motion picture?

A. Paramount.

Q. And where did it play?

A. It played at the Randolph Theatre—I mean, the Midtown Theatre.

Q. Where? The Midtown Theatre?

And was that the famous 994-seat Midtown Theatre, Mr. Wren?

A. Yes, sir.

Q. These are all Paramount.

Now, how many weeks did it play?

A. A total of—from February 1, 1955, to May 17, 1955, a total of 15 weeks.

Q. And what was the highest weekly gross it achieved in any week?

(3194)

A. $33,681.57 which was the first week of the engagement.

Q. And what was the first week's gross at the Viking Theatre on NOT AS A STRANGER?

A. $34,047.

Q. All right. Now, what was the total gross of the engagement at the Midtown Theatre?

A. In the 15-week period, they grossed $243,778.17.

Q. And how much film rental was paid?

A. The Midtown paid a film rental of $151,661.50

Q. And did you apply to this gross on a weekly basis the bid that was submitted to Paramount on behalf of the Viking Theatre?

A. Yes, sir.

Q. And what film rental would have been paid by the Viking Theatre by Paramount if the picture had played at the Viking Theatre instead of the Midtown and achieved this gross?

A. $152,250.35.

Q. How much more would Paramount have received?

A. Viking would have paid $1588.85 more to the distributor, Paramount.

Q. Did Viking offer a guarantee on the picture?

A. Yes, sir, a $60,000 guarantee.

Q. Did the Midtown offer a guarantee?

A. No, sir, no guarantee.

(3195)

Mr. Rome: That isn't so.

Mr. Sawyer: Just a minute.

Mr. Rome: The witness has testified incorrectly.

Mr. Sawyer. Well, I will correct it. I will take him through it.

By Mr. Sawyer:

Q. When you said no guarantee, Mr. Wren, I just want the ultimate outcome, not the entire story about the licensing or how many different bids there were, ultimately.

A. Finally, yes, a $75,000 guarantee, sir.

Q. Now, was the advertising clause in both of the offers the same, Mr. Wren?

A. The distributor to pay all advertising under both the bid and the contract.

Q. Very well. Now, on the motion picture COURT JESTER, where did that motion picture play?

A. Paramount picture that played at the Midtown Theatre.

Q. In what period of time?

A. From February 2, 1956, to March 1, 1956.

Q. How many weeks is that?

A. Four weeks.

Q. What was the highest weekly gross that it obtained in any one week?

(3196)

A. The first week, $16,779.58.

Q. $16,000? Very well. Now, what was the total gross of the engagement?

A. In the four-week period, it was $46,456.27.

Q. And how much film rental did the William Goldman Theatre pay to Paramount?

A. The Midtown Theatre paid a film rental of $15,834.02.

Q. Now, did you apply with that gross the terms offered by the Viking Theatre to Paramount for the exhibition of the motion picture COURT JESTER?

A. Yes, sir.

Q. And what would the film rental have been if the picture had been awarded to the Viking Theatre and had grossed the same as this?

A. $23,810.64.

Q. And how much more film rental would that have meant to Paramount?

A. $7,976.62 more to Paramount.

Q. Now, on the motion picture HELL'S ISLAND, who produced that motion picture, Mr. Wren?

A. Paramount.

Q. And where did that motion picture play?

A. At the Mastbaum Theatre.

(3197)

Q. Did the Viking submit a bid on that motion picture?

A. Yes, sir, a written bid.

Q. Did I ask you who the distributor was?

A. Yes, sir, Paramount.

Q. How long did the picture play at the Mastbaum?

A. From May 20 to May 27, 1955.

Q. A period of what, sir?

A. One week.

Q. And what was the gross in that one week?

A. $5,918.29.

Q. And how much film rental was paid?

A. $1,183.66.

Q. Was there an amount of money reimbursed to the Mastbaum, Stanley Warner's Mastbaum, in connection with advertising expenditures by it?

A. Yes, sir, Paramount returned $732 to the Mastbaum Theatre for advertising.

Q. And that left a net to Paramount of how much?

A. Net film rental of $451.66.

Q. Did the Viking bid on that motion picture?

A. Yes, sir.

Q. What did it bid?

A. A flat bid, by that I mean a flat film rental, of $1625.

(3198)

Q. Does that mean that that amount was paid irrespective of how the motion picture performed?

A. Yes, sir.

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(3199)

Q. Now, how much more would Paramount have received, Mr. Wren, had the picture been licensed to the Viking?

A. $1,173.34.

Q. Now, the motion picture THE BIRDS AND THE BEES, who produced that motion picture?

A. Paramount.

Q. And did Viking bid on it?

A. Yes, sir.

Q. And where did the picture play?

A. It played the Midtown Theatre.

Q. Now, it played the Midtown Theatre and when did it play the Midtown?

(3200)

A. May 9 to the 15th, 1956.

Q. A period of how long was that, sir?

A. One week, sir.

Q. And what did it gross in that one week?

A. $7,591.10.

Q. And how much film rental did the Paramount receive as a result of that one week's exhibition?

A. $1,897.78.

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(3201)

Q. Was there an advertising clause in that license to Midtown?

A. No, sir.

Q. How much was in fact paid to the William Goldman Theatres, Inc., paid back to him with respect to advertising expenditures?

A. The advertising paid back to Midtown by Paramount was $3,111.43.

Q. So did Paramount make any money out of that exhibition?

A. No, sir.

Q. Did it sustain a loss?

A. Yes, sir.

Q. What was the amount of the loss?

A. $1,213.65.

Q. Now, in the Viking bid, Mr. Wren, assuming that the picture BIRDS AND BEES had been awarded to the Viking would have grossed the same amount, what would have been the film rental returned by the Viking?

A. $1,897.78.

Q. Did you offer the same percentage return as the Midtown?

A. Yes, sir.

(3202)

Q. Did you offer an advertising clause in your bid? Was your bid in writing?

A. Yes, sir.

Q. Did you offer an advertising clause?

A. Yes, sir.

Q. What was it?

A. 50 per cent.

Q. Do you know what the total advertising was expended?

A. Paramount spent $4,492.43 to advertise the picture.

Q. Under your bid how much of that would have been reimbursable to you?

A. The Viking would have had to pay $2,246.21 toward the advertising of the picture.

Q. And would Paramount therefore also have had to pay $2,246.21?

A. Right, sir.

Q. Had the picture been awarded to the Viking what would Paramount's loss have been?

A. $348.43.

Q. So they would have had how much less of a loss?

A. $865.22.

Mr. Nizer: Now, Mr. Sawyer, will you be good enough to take a correction now instead of waiting?

Mr. Sawyer: Numerical? Yes, I will.

(3203)

Mr. Nizer: You said that the percentage terms were the same. The Midtown was 25 to 65. The BIRDS AND BEES was 25 to 50. So the Midtown, all percentages were higher.

Mr. Sawyer: May we have the offer for BIRDS AND BEES?

We will go into that, Your Honor, to make that clear.

Well, maybe I can save time on that.

You do not claim, I take it, Mr. Nizer, that under that sliding scale that would in any way change this result?

Mr. Nizer: I do not think so.

The point is that at the time the bids were considered by the distributor.

Mr. Sawyer: This is an argument you are going to make—

Mr. Nizer: Not on hindsight. That he had a higher percentage.

Mr. Sawyer: The figures are correct?

Mr. Nizer: Yes.

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(3205)

TWENTIETH DAY

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(3207)

(The following transpired in the absence of the jury:)

The Court: Now, gentlemen, as I understand it, the matter on which the briefs were submitted and on which I now request argument arose by reason of Mr.

Sawyer's desire to prove something with respect to discrimination as it, he alleges, applied to Viking by Loew's, and the question then was: Have I already resolved that question as to all testimony, including advertising, in confining it to the 75 pictures that were bid for by Viking?

What I desire to do now after arguing is to rule on the problem as to whether all comparisons of advertising, all comparisons of adjustments, all comparisons and testimony of every kind should be confined to the 75 pictures.

Do you understand that?

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(3209)

Mr. Sawyer: First of all, Your Honor, I would offer to prove that the Viking Theatre played—this is on the question of bids, Your Honor, which was one of the original points which came up Friday—31 pictures and it made approximatley 16 bids; that the Goldman Theatre played 67 pictures and only made four bids, oral or written, and of the four pictures on which they bid they obtained three; that the Midtown Theatre played 39 pictures and bid only on three, either with an oral or written bid, and obtained three out of the three on which they bid.

The Court: Now, this is in addition to the 75?

Mr. Sawyer: Yes, sir, this is in addition to the 75.

(3210)

The Court: It is not part of the 75?

Mr. Sawyer: No, sir. Actually, we should call it 85. Were it part of the 85, then I would assume that Your Honor would have no doubt about it.

The Court: Yes.

Mr. Sawyer: That is right.

Some of the 75 may be included in here, but it includes motion pictures in addition, outside the 75.

That the Randolph Theatre played 27 pictures and bid, orally or in writing, on only four, and of those four obtained two.

I offer to prove that of the 31 pictures received during the period in suit, licensed during the period in suit, of those 31 pictures having a national gross of four million or more the Viking obtained one, the Stanley Warner chain got 13, the Goldman chain got 13, and the Fox got four. Of pictures over three million national gross there were 49 such pictures, which the Viking got two, Stanley Warner got 18, the Goldman chain got 20, and the Fox got 9.

I offer to prove with respect to the grossing ability of the motion picture house, only with respect to the grossing ability, Your Honor, and I would like to reserve this again to make an offer on rebuttal—

The Court: No, before you go into grossing

(3211)

ability, what is your contention that those facts would establish?

Mr. Sawyer: The ones that I just mentioned, Your Honor?

The Court: Yes.

Mr. Sawyer: Well, Your Honor, the first one about bids will establish the fact that the Viking was compelled constantly to bid; it bid for the majority of pictures that it got; and it bid for the majority of pictures that it didn't get, that we complain about, we bid; whereas, under arrangements between the distributors and the Goldman chain, Goldman was not required to bid and didn't bid, and, secondly, when he did bid he

got virtually every picture he bid on as opposed to our 29 out of the 75. The chain as a total having bid on 11 motion pictures acquired 8 of those 11, and that it is a disadvantage obviously to have to bid, particularly a written bid, as opposed to no bid.

That of this large number of motion pictures that the Goldman chain obtained over 100, and only 11 of them was there any bid. That with a picture the first writing involved is a license, an actual license. The pictures went to Goldman Theatres without bidding, and we say that was part of the split arrangement.

The second point about the national gross

(3212)

tends to establish that irrespective of those motion pictures, the 85 which we sought, we got far less than our share of quality motion pictures.

That is the four million and three million national gross.

Finally, as to grossing ability, of course, it seems to me that I must prove that my theatre, the Viking, is capable of grossing equal to the average of the other theatres. If it cannot gross, if for some reason it is a theatre which is not able to tabulate and to accomplish big grosses, that would be a perfectly legitimate reason; in fact, the paramount reason would be that one for not giving us film. Obviously, if the theatre is so situated, or so run, or whatever it may be, that it cannot turn in grosses to the distributors this would be a reason justifying our deprivation of film, and which we would thoroughly agree would be sufficient unto itself. It is a very important one.

The Court: First of all, you have talked about what?

Mr. Sawyer: Bids first.

The Court: Bids?

Mr. Sawyer: The first thing I talked about, Your Honor, and offered to prove is what I characterize as a very striking and very marked discrepancy.

(3213)

The Court: You are not talking about comparison of superior and inferior bids now, are you?

Mr. Sawyer: No, sir.

The Court: You are talking about the fact that you want to show that whereas the Viking had to bid to get a picture Goldman got most of the pictures by negotiation.

Mr. Sawyer: Yes, sir, almost all.

The Court: And that it is an advantage to be able to negotiate rather than to be forced to bid; is that right?

Mr. Sawyer: Yes, sir.

The Court: And this applies to pictures outside the 75.

Mr. Sawyer: Yes, sir.

The Court: Or the 85 we are talking about now.

Mr. Sawyer: Yes, sir.

The Court: All right. First, bids against negotiations.

Mr. Sawyer: I might just say one word more about bids, Your Honor.

The Court: Yes.

Mr. Sawyer: In connection with that proof I would show that on pictures where Goldman did not bid, just as I say, almost the entire majority, the large majority of

(3214)

pictures, it was an advantage because he obtained those pictures at less rental terms than pictures that we obtained. He paid less film rental for them.

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(3221)

Mr. Sawyer: The second one was—this isn't a big point, Your Honor, it is just an illustration—the second one was to show the disproportion of films over four and three million national gross which went to the Viking.

Now, again, I can already show it as to the 85 but this is to show it as to all films which were licensed first run Philadelphia during the suit period.

The Court: What did you say?

Mr. Sawyer: The disproportion of quality films, i.e., over four million and over three million that went to the Viking Theatre.

The Court: Wait a minute.

Mr. Sawyer: One out of 31 with respect to motion pictures over four million.

The Court: One out of what?

Mr. Sawyer: One out of 31.

(3222)

The Court: Over four million, yes.

Mr. Sawyer: Over four million, and two out of 49 with respect to pictures over three million.

The Court: In other words, you are going to show the national film rental of 80 more pictures; is that right?

Mr. Sawyer: Well, no, I wasn't going to put all the numbers on that. I would just by asking Mr. Wren if he counted the numbers and if there were 31 and how many the Viking got, and so on. And on that, Your Honor, there is another point which is that as to pictures over four million, for what it is worth, it is notable that the Stanley Warner chain and the Goldman chain got precisely the same number, they both got 13, and as to pictures over three million national gross they almost came out even; Stanley Warner got 18 and Goldman got 20, which is further circumstantial evdience of the existence of the split to insure that the product would be equally divided, quality product.

Now, the third point, Your Honor, is grossing ability and I offer to show that the Viking Theatre can gross—not can, strike that—has during the period of suit grossed better than the average grossing ability of all of the defendant theatres.

The Court: Now, this is during the period of

(3223)

suit?

Mr. Sawyer: Yes, sir, during the period of suit.

The Court: I don't think we hav. a problem then, do we, as to this argument as to that?

Mr. Sawyer: Yes, sir. This would be based, Your Honor, on performance of the Viking Theatre on motion pictures other than the 85.

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(3224)

Mr. Sawyer:

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In other words, all I am trying to show here is that the Viking did have and does have grossing potential. This is merely to establish—

The Court: All right. How are you going to do that?

Mr. Sawyer: Well, I will tell you how I propose to do it, Your Honor. We have this began to come up the other day.

We take the only yardstick that exists for the quality of the motion picture, to wit, national film rental,

(3225)

and we would take the sum total of the national film rental of all of the motion pictures that played at each theatre, theatre by theatre, and we would then see what percentage the local gross achieved here bore to the total national film rental.

Now, that would show you, Your Honor—

The Court: You mean by each theatre?

Mr. Sawyer: Yes, sir—that would show you that the Viking's is 2½ per cent. In other words, the local, the grosses achieved here in Philadelphia by the Viking during the period of suit on all of the pictures that showed, good, bad, and indifferent, is 2½ per cent of the national film rental of those same motion pictures, and that—I just take the next one on my list—that the Goldman Theatre, doing it the same way, that it is only 1½ per cent, that the grosses achieved, sum total, by the Goldman Theatre on all the pictures it showed during the period of suit, good, bad and indifferent, is 1½ per cent of the national gross, and so on down the line.

The Court: You mean national film rental.

Mr. Sawyer: Excuse me—national film rental.

The Court: Its grosses.

Mr. Sawyer: Yes, sir. Its grosses. Its grosses.

(3226)

The Court: Boxoffice receipts.

Mr. Sawyer: Yes, sir, the boxoffice receipts of each motion picture and to see what percentage that bears to the national film rental of the same motion pictures, all of those being those shown during the period of suit, to show Your Honor that without giving to each individual figure the average of all of the defendant exhibitor theatres, the average is 1.8 per cent, that that is the percentage of the national film rental that they acquired and achieved right here in Philadelphia, whereas the Viking is 2½ per cent.

Now, there will be objected and was that you are comparing applies to oranges, because they say one is film rental, which is the amount received by the distributor, and the other is boxoffice receipts.

Well, Your Honor, this is only, if at all, a superficial dichotomy, because national film rental is used in this instance as a yardstick of value.

Now, it is agreed that it is a good yardstick of value, but whether or not it may be used in terms of what the distributor should have done when they awarded films, because they didn't know what national film rental was going to do, is an argument that doesn't affect this, because this only shows one thing—in other words, the hindsight objection doesn't invalidate this, for this reason: This is, regardless

(3227)

of how it finally turned out—it did, in fact, turn out a certain way—a motion picture did, in fact, turn out to be capable across the country of drawing a certain amount at the boxoffice, and all we want to do is to say, "Well, now, how did this Viking Theatre here in Philadelphia do in that respect as compared with what all of the theatres all over the country did?" because what

all of the theatres all over the country did is reflected directly in national film rental.

Now, it is true that national film rental is not boxoffice gross, but it is what it is, is a percentage of boxoffice gross—what percentage, I don't know exactly, but a substantial percentage—therefore, any differences are obviously statistically even, because national film rental is, in turn, dependent entirely on boxoffice gross, so that it is really a measure of boxoffice gross and, in any event, it is a measure of the value of the product, and it seems to me quite persuasive of the Viking's ability to gross, if it is shown—and the figures will so show; the defendants have the calculation and I think make no objection to the actual figures, only to the relevancy—that the Viking Theatre here has demonstrated and did demonstrate during the period in suit that on—it could outgross the average defendant theatre. In fact, it outgrossed every single one, taken individually or any other way, except the Randolph.

(3228)

The Randolph exceeded it by six one-hundredths of a per cent. Every other motion picture first-run Philadelphia couldn't touch the 2½ per cent figure.

Mr. Young: Well, now, Mr. Sawyer, that is not correct and you know it is not correct. You say six one-hundredths of 1 per cent. Tell His Honor what Fox was.

Mr. Sawyer: Yes, the Fox was less than the Viking Theatre.

Mr. Young: It was only six one-hundredths of a per cent the same.

Mr. Sawyer: Your Honor, the Fox, Your Honor, was less than the Viking, and, therefore, my statement stands, but it isn't necessary for the Viking to be the

top grossing motior picture house in the city to get film. All we have to do is to be better than 1.8, as good as 1.8, even a little less, but we are markedly higher.

Now, Your Honor, this is, absolutely, it seems to me, determinative of grossing ability. You are not speculating about, "Well, I don't know about their location and I am not sure about the number of seats, and whatnot." How did—How did it actually work out? The fact that 2½ per cent of the national film rental of the pictures the Viking played were accounted for by the Viking Theatre, whereas the defendant theatres taken collectively could only account for

(3229)

1.8, that same amount.

Now, also, Your Honor, I offer to prove and I did commence before to prove that the Viking did not get quality product, and this is irrespective again of whether we bid or not—this is the over-all picture—that there is only one way to measure quality—that is again national film rental—and this next demonstration, which would be No. 4, would establish these facts: That the sum total national film rental of the motion pictures which the Viking obtained during the period in suit was $45,000,000, all the pictures, good, bad, indifferent that played at the Viking Theatre during this period; that the Goldman chain averaged 71—I am shortening it; I have the individual pictures— averaged 71 million for its three theatres, averaged 71.9—that is 72 million—and the Stanley Warner average was also, strikingly enough, 72 million. Both these chains got precisely—well, I say "precisely"—within a few thousand dollars the same value of product, and that the Fox Theatre got product worth $80,000,000, thus demonstrating that aside from pictures on which we bid that the way it worked out was that they got markedly better film—and note, Your Honor, that these discrep-

ancies, these differences that I am showing are in no case slight; they are always—and I think this is true of each of my demonstrations, very marked differences—

(3230)

very marked differences. It is a tremendous difference, certainly, to a motion picture theatre to have gotten $45,000,000 worth of product as opposed to these 72's for the other two chains and 80 for the Fox.

Now, Your Honor, I would also show the film rental adjustments by theatres. This is adjustments in the form of actual monetary adjustments—monetary adjustments—usually amounts paid back in effect for the exhibition of a given film by means of amending the contract and lowering the percentage terms required to be paid by the exhibitor, although it was done in a number of different ways.

In each instance, Your Honor, this would be an amount of money paid back by the distributor or given the exhibitor—either way—which was an amendment and something that the distributor did not have to do under its actual written contract. We would show that the Viking—and this is a question again of inequality of treatment; it is somewhat similar to the advertising situation, this being No. 5, I would say, Your Honor, just so we can keep this straight—

The Court: Yes.

Mr. Sawyer: —that the Viking got two adjustments on—got adjustments on the film rental on two of those

(3231)

31 pictures amounting to a total of $1,930, that the Goldman Theatre got adjustments on 21 pictures amounting to $32,586; the Midtown Theatre—

The Court: How many? How many?

Mr. Sawyer: Sir?

The Court: How many?

Mr. Sawyer: Goldman, 21 motion pictures amounting to $32,586 worth of adjustments, dollars of adjustments.

The Court: Now, this is on all pictures?

Mr. Sawyer: All pictures, Your Honor—all pictures.

The Court: The Goldman played.

Mr. Sawyer: Yes, sir, and all that we played—all for everybody.

—that the Midtown Theatre got adjustments on 16 pictures for a total of $16,816; that the Randolph Theatre got adjustments on 11 pictures for a total of $27,666; that the Mastbaum Theatre got adjustments on 24 pictures for a total of $15,401; the Stanley Theatre got adjustments on 32 pictures for a total of $51,310; that the Stanton Theatre got adjustments on 26 pictures or a total of $5,137, and that the Fox Theatre got adjustments on 13 pictures for the total of $27,147—the total adjustments to the Viking Theatre being

(3232)

$1,930, as I said, and the total adjustments to the defendant exhibitors being $167,074 on 150 motion pictures.

I would also offer to prove, Your Honor—I don't think this is—there is any argument about this one, but because I think this is what the defendants said I had to do in this respect; this is No. 6, I think—I would also compare local film rental, local film rental with national film rental. This is the one the defendant say would be

comparing oranges and oranges instead of oranges and apples. I would take the national film rental of all, the sum total of all of the pictures played at the Viking Theatre and all other theatres during the period of the suit, and I would compare with that the local film rental paid by those theatres, each of them, how much local film rental, how much film rental, I call it—should call it—how much film rental did they pay in proportion, and I would demonstrate that the Viking paid the highest proportion of film rental as compared with national film rental of any motion picture first-run Philadelphia.

Then, finally, Your Honor, I would, of course, demonstrate all of the factors inherent—well, I am sorry—on advertising.

Then on advertising, Your Honor, I would offer to prove specifically with respect to—and this is

(3233)

the point we were on that started the phase of this controversy, I believe—as I stated in my brief to Your Honor, that the Viking Theatre licensed quite a few motion pictures and that it was a condition of that licensing and of obtaining those films that the Viking enter into a markedly unfavorable advertising arrangement on the assurance of the Loew's officials that this was the way it was always done, that the Viking's arrangement in contract after contract was that in the first week the Viking paid this first $700 worth of advertising themselves entirely and in the second week the first $300 worth of advertising, and that thereafter advertising would be split 50-50 between distributor and exhibitor; whereas, (a) the representation of Loew's to the effect that this was the way it was done first-run Philadelphia was untrue, and I demonstrate that by contracts with other exhibitors where a different arrangement, namely, the fact that on 90/10 deals—that is the kind we are talking about here—the distributor

paid all advertising, all advertising, without a house net and without a 50-50 split, and that this was a discrimination by Loew's against the Viking Theatre; it was treating us to our economic disadvantage in a way different than that accorded to the first-run defendant exhibitors.

And also I would prove with respect to adver-

(3234)

tising, Your Honor, that generally, not only with respect to motion pictures that we sought to license, but that in the whole period of first-run Philadelphia during the period of the suit the Viking had to pay a substantially higher percentage of advertising to its gross than the other theatres, and that this, of course, also was to our detriment.

Now, I might say on that, Your Honor, parenthetically, that as an item of damage in this case this difference in advertising has been ruled by Your Honor not to be an item of damage, Your Honor having ruled that that is out along with the other two schedules, and that we are only on the Schedule A. I offer to show it not to show damage but to show an additional prong and basis of discrimination.

Now, Your Honor, I think that covers the material that I would show from other—as to other films. There are other features to the case. I mean, we hadn't—we would be showing, for instance, the Schwalberg agreement, but that wouldn't be kept out by Your Honor's ruling, any way, because that would apply to some of the pictures, the 85. If that arrangement is proved, it would be with relation to those pictures and, of course, others as well, but with relation to those.

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(3347)

The Court: Gentlemen, as you know, we have had argument all morning and part of this afternoon on the

various points that have been presented, and I am prepared to rule.

First of all, Mr. Sawyer has asked me to review my ruling of last Friday, limiting the testimony in relation to superior or inferior pictures. As I ruled then, I limited it to the pictures that the Viking sought. I adhere to that ruling.

As to a decision on the various points that we argued today, I will refer to them as presented by Mr. Sawyer in his offer of proof.

Number one is the question of what pictures can be shown on a comparison between pictures where bids were made against negotiations. In other words, it is Mr. Sawyer's contention, as I understand it, that the distributors—and he would be able to show—can make out better with film rental on pictures bid rather than pictures negotiated. My ruling is that evidence as to those comparisons will be limited to the 85 or whatever number of pictures it is in which Viking showed an interest.

Number two, disproportion of quality film—that is, how many pictures over four million and compared to how many pictures over three million, national film rental,

(3348)

as to all exhibiting defendants. My ruling is that evidence on that feature of the case will also be limited to the pictures sought by Viking.

As to Point No. 3, what Mr. Sawyer has described as grossing ability or grossing potential, a percentage of the box office receipts to the national film rental of all pictures, I rule that that evidence in its entirely is incompetent, in that it has no probative value and, of course, that means no pictures at all.

Number four, the question there is of the total national film rental played at the Viking, along with the

Goldman, Stanley and Fox. I have heretofore decided that that is incompetent in its entirety. I adhere to that ruling for the reason, in my judgment, it has no probative value.

Number five, as to adjustments, amending contracts, making payments back to the exhibitor, lowering rentals, and so on, I limit all evidence as to that to the pictures actually sought by the Viking.

Number six, a comparison of percentage of local film rental with national film rental. Mr. Sawyer wanted to show that that comparison would indicate that the Viking paid more percentagewise in film rental than other exhibitors, parties to this suit. I rule that that testimony

(3349)

is incompetent in its entirety. I am of the opinion that it has no probative value. In other words, even though those figures are established, they do nothing to help us with respect to the existence of a conspiracy by reason of the fact that the comparisons can't give us a true picture for the reasons that have been indicated in the argument.

I come to No. 7 dealing with the advertising and all evidence with respect to advertising is limited to the pictures sought by the Viking.

I have added to No. 8, availability, as No. 9, change of playing time, and as to those two my ruling is the same, that all testimony as to those two—that is, availability and change of playing time—should be limited to the pictures sought by the Viking.

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(3350)

JAY WREN, resumed.

DIRECT EXAMINATION (continued)

By Mr. Sawyer:

Q. Mr. Wren, you previously testified and made comparisons of the film rental which was paid at the theater in which certain motion pictures showed and the film rental that would have been received by the distributor had the picture played at the Viking Theatre. Now, going back to the first of those on just one point, BRIDGES AT TOKO-RI, was there an adjustment on that motion picture granted to the Randolph Theatre?

A. Yes, sir.

(3351)

Q. In what amount?

A. $5810.

Q. And on the motion picture HELL'S ISLAND, was there an adjustment on that picture granted to the Mastbaum Theatre?

A. Yes, sir.

Q. In what amount?

A. $295.

Q. And on the picture COURT JESTER, which I believe was the last one that you did, two questions: Was there any bid, oral or written, on that motion picture from the Midtown Theatre?

A. No, sir.

Q. And was there an adjustment on that motion picture?

A. Yes, sir.

Q. In what amount?

A. $1258.

Q. Now, I invite your attention to the motion picture THAT CERTAIN FEELING, and I believe that is where we stopped. Yes.

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Q. Now, on that motion picture, Mr. Wren, what was the

(3352)

actual gross—excuse me—what was the actual film rental paid by the Midtown to the distributor, Paramount?

A. $8547.28, less advertising of $4,732, leaving a net film rental of $3,815.28.

Q. And did you assume the same grosses at the Viking Theatre and applied thereto the terms offered by the Viking for that motion picture?

A. Yes, sir.

Q. And what film rental would have been paid by the Viking Theatre?

A. The Viking would have paid $9,511.35, less advertising of $9,464, leaving a net of $47.35.

Q. And, therefore, that motion picture would be—how much more would the Midtown have—did the Midtown pay than would have been paid by the Viking under that bid, assuming the same gross?

A. The Midtown paid $3,767.93 more to the distributor than the Viking would have paid.

Q. Now, on the motion picture THE MOUNTAIN, who distributed that motion picture?

A. Paramount, sir.

Q. And what was the actual film rental paid to the distributor in the exhibition of that motion picture at the Goldman Theatre?

(3353)

A. $2,217.78.

Q. And on the same—and what was the gross?

A. The gross was $8,871.13.

Q. How many weeks?

A. It played from October 17, 1956, to October 24, 1956—one week.

Q. And what would the film rental have been under the terms offered by the Viking had it played at that theater and achieved the same gross?

A. $3,169.02.

Q. And how much more would the Viking have paid then than the Goldman Theatre?

A. The Viking would have paid $951.24 more to the distributor.

Q. Was there any bid, oral or written, by the Goldman Theatre on that motion picture?

A. Yes, sir.

Q. Now, on the motion picture WAR AND PEACE, did the Viking bid on that motion picture?

A. Yes, sir.

Q. And who was the distributor?

A. Paramount.

Q. And what was the total gross—or, where did the picture play?

(3354)

A. It played at the Stanley Theatre.

Q. And what was the total gross, Mr. Wren?

A. $117,379.20.

Q. And what was the biggest single week gross?

A. $30,644.20, which was the first week of the engagement.

Q. Had the Viking ever achieved in one week a higher gross than this?

A. Yes, sir, with NOT AS A STRANGER.

Q. And what was the film rental, total film rental paid to the distributor?

A. $47,547.38.

Q. Now, Mr. Wren, did you apply to this gross the terms offered by the Viking Theatre to Paramount for the exhibition of that picture?

A. We did.

Q. And applying those terms, how much film rental would the Viking have paid to Paramount had it been awarded the picture and grossed the same?

A. $67,239.80 would have been paid by the Viking.

Q. And was there any difference in advertising? What were the advertising terms that—

A. Under both deals, the distributor was to pay all advertising.

Q. So then how much more would Paramount have received

(3355)

from the exhibition of the motion picture had it played the Viking and achieved this gross?

A. $19,692.42.

Q. Did the Viking offer a guarantee on this motion picture?

A. Yes, sir—$45,000 guarantee.

Q. And was there any guarantee offered by the Stanley Theatre?

A. No, sir.

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(3359)

Q. Now, turning to Warner Brothers motion pictures, Mr. Wren, did you bid on the motion picture THE McCONNELL STORY?

A. We did.

Q. And where did that motion picture play?

A. At the Randolph Theatre.

Q. And did you make a written bid?

A. Yes, sir.

Q. Did the Randolph Theatre make any bid, oral or written?

(3360)

A. No, sir.

Q. Where did the—excuse me—how long did that picture play, Mr. Wren?

A. Two weeks and two days.

Q. And what was the highest gross in any given week?

A. First week $15,030.77.

Q. All right; what was the total gross?

A. The total gross was $24,236.77.

Q. And how much film rental was paid by the Randolph Theatre to Warner Brothers?

A. $6255.22, less advertising of $3198, giving—leaving a net film rental of $3057.22.

Q. All right, sir; did you apply to the grosses of McCONNELL STORY at the Randolph the terms offered by the Viking Theatre for the exhibition of that motion picture?

A. We did.

Q. And did you include therein the cost of advertising as it would have been included in the Viking bid?

A. Yes, sir.

Q. And did you deduct it from the film rental that you would have obtained under your terms?

A. We did.

Q. And what was the net, then, which would have been received by Warner Brothers if the picture had shown at the

(3360a)

Viking Theatre and attained this gross?

A. $6132.29.

(3361)

Q. How much more then would Warner Brothers have obtained from Viking for the exhibition under those circumstances?

A. $3,075.07.

Q. Did you seek to license the Warner Brothers picture PETE KELLY'S BLUES?

A. Yes, sir.

Q. Was that bid acceped or rejected?

A. Rejected.

Q. Where did the motion picture play?

A. At the Goldman Theatre.

Q. Was the Viking bid larger?

A. Yes.

Q. Did the Goldman Theatre make a written bid?

A. No, sir.

Q. Did it make an oral bid?

A. No, sir.

Q. What was the best weekly gross of the exhibition of PETE KELLY'S BLUES at the Goldman Theatre?

A. $31,580.14, the first week of the engagement.

Q. Has the Viking Theatre ever obtained a larger weekly gross than that?

A. Yes, sir, with NOT AS A STRANGER.

Q. What was the total gross of the exhibition at the Goldman Theatre?

(3362)

A. In the three weeks they grossed $55,559.18.

Q. And how much film rental did they pay to Warner Brothers?

A. $22,114.67, less advertising of $2,886, leaving a net film rental of $19,228.67.

Q. Now, did you apply to this gross the terms and conditions offered by the Viking Theatre, taking into account those advertising terms?

A. Yes, sir.

Q. What would have been the film rental itself for the exhibition at this theatre, the Viking, of this motion picture at the Viking Theatre, assuming that the same gross was obtained.

A. $31,487.36, less advertisng cost of $5086, leaving a net film rental of $26,401.36.

Q. And Warner Brothers would therefore have received how much more?

A. $7,172.69 more from the Viking.

Q. Now, let me ask you a question on this PETE KELLY'S BLUES: Did your bid contain a clause that the distributor would pay for the cost of news and shorts?

A. Yes, sir.

Q. And in making this computation and in calculating what amount would have been paid to the distributor in film rental

(3363)

did you make an allowance for the fact that your bid required them to pay for news and shorts?

A. Yes, sir.

Q. How much did you allow for that?

A. $150 a week.

Q. Is that the cost of news and shorts?

A. No, sir, it is usually under that.

Q. It is usually under that?

A. Yes, sir.

Q. Now, the next motion picture of Warner Brothers, Mr. Wren, I invite your attention to BLOOD ALLEY and ask you whether you made a bid for that picture.

A. We did.

Q. Where did that play?

Was your bid accepted or rejected?

A. Rejected.

Q. Where did it play?

A. It played—I don't have it there.

Stanley Theatre, I am sorry. Stanley Warner's Stanley Theatre.

Q. How many weeks did it play?

A. From September 23 through October 7. Two weeks.

Q. What was the highest weekly gross?

(3364)

A. $15,953.76, the first week.

Q. What was the total gross?

A. The total gross for the engagement was $23,713.28.

Q. What film rental did Stanley Theatre pay to Warner Brothers?

A. $8,656.61, less advertising of $2,656, leaving a net film rental of $6,000.61.

Q. Did you calculate the film rental that would have been paid by the Viking Theatre had the picture been exhibited under the terms of your bid, assuming the same gross?

A. Yes, sir.

Q. What amount would that have been?

A. The film rental would have been $11,585.61, deducting four thousand—

Q. Before advertising, let me ask you a question. Did your bid contain a provision with respect, the same as the previous one, to news and shorts?

A. Yes, sir.

Q. And did you deduct the same $150 each week from what you say that the distributor would have received?

A. Yes, sir.

Q. Didn't it also include a clause with respect to overtime?

A. Yes, sir.

(3365)

Q. What was the clause with respect to overtime?

A. Additional charge for news, shorts or over-time.

Q. And that is to be paid by the distributor?

A. Yes, sir.

Q. Did you in calculating what the distributor would have gotten make a deduction for the fact that he would have had to pay for any overtime had there been any?

A. Yes, sir, we computed it.

Q. What figure did you use?

A. $200 a week.

Q. Did you use that in each week in every occasion where you bid overtime?

A. Yes, sir.

Q. And, in fact, have you charged overtime, in the pictures that you did show, to the distributors, and if so, how frequently?

A. Very seldom, and I don't think it has ever exceeded seventy-five, seventy-six dollars a week.

Q. And how many cases approximately?

A. One or two cases.

Q. One or two cases, but in each case where your bid included overtime did you actually deduct that from this on the supposition that a full $200 would have been paid for overtime?

(3366)

A. Yes, sir.

Q. All right. I think you gave us the film rental. Did your bid contain an advertising clause?

A. Yes, sir, they have to pay advertising.

Q. What was the advertising that you deducted from this amount to determine the amount net that Warner Brothers would have received?

A. We deducted $4000 for advertising.

Q. And that would mean a net amount to Warner Brothers of what?

A. A net film rental of $7585.61.

Q. And how much more to Warner?

A. The Viking would have paid Warner $3,199 more.

Q. On the base film rental?

A. Yes, sir.

Q. And then on the basis of the deduction for advertising you subtract what sum, $1,585, is that correct?

A. Yes, sir.

Q. Now, the next motion picture of Warner Brothers, HELEN OF TROY, Mr. Wren.

A. Yes, sir.

Q. Did you seek to obtain HELEN OF TROY?

A. We did.

Q. Did you make a bid for it?

(3367)

A. Yes, sir.

Q. Where did that motion picture play?

A. The Stanley Warner Mastbaum Theatre.

Q. What was the highest weekly gross it obtained?

A. $29,203.59, which was the first week of the engagement.

Q. Has the Viking Theatre obtained that gross in one week?

A. More than that, sir.

Q. What was the total gross attained by HELEN OF TROY and how many weeks?

A. For three weeks and five days the total gross was $64,429.59.

Q. What film rental was paid to Warner Brothers by the Mastbaum?

A. A film rental of $23,378.51.

Q. Did you calculate what Warner Brothers would have received for film rental had the motion picture played at the Viking Theatre, under the terms of your bid, and grossed the same amount.

A. Yes, sir.

Q. What was that amount, Mr. Wren?

A. $38,833.95.

Q. Was that after making deductions for any overtime and cost of news and shorts?

(3368)

A. Yes, sir, on the same basis as the others.

Q. How much more, therefore, would Warner Brothers have received under this basis?

A. $15,455.44 more from the Viking Theatre.

Q. Did you make any provision for advertising?

A. They were to pay advertising, sir.

Q. Did the Viking offer a written guarantee on this motion picture?

A. Yes, sir, of $13,500.

Q. Was any guarantee offered by the Mastbaum?

A. No, sir.

Q. Now, on the Warner Brothers motion picture SERENADE.

That was HELEN OF TROY.

SERENADE, did you seek to obtain a license to exhibit that motion picture at the Viking Theatre?

A. We did.

Q. Where did the motion picture play?

A. At the Goldman Theatre.

Q. Did you make a written bid?

A. We did.

Q. Did the Goldman Theatre make a written bid?

A. No, sir.

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(3370)

Q. All right, Mr. Wren, let me ask you just this on SERENADE: What was the highest weekly gross?

A. $23,675.44, which was the first week of the engagement.

Q. I will shorten this.

Did you compute the total gross?

A. Yes, sir.

Q. From the records of the defendants?

A. Right, sir.

Q. From the exhibition at the Goldman Theatre?

A. Right.

Q. Did you find what film rental, less advertising, Warner Brothers received from the Goldman Theatre for the exhibition of this motion picture?

A. The net film rental, after advertising, that is, was

(3371)

$19,653.93.

Q. And did you make the same computation as you made before with respect to the Viking bid and its terms applied against that gross?

A. Yes, sir.

Q. And what film rental would have been paid?

A. After deducting advertising of $7,119 the net film rental from the Viking would have been $26 021.14.

Q. And how much more to the distributor?

A. $6,367.21 more to the distributor.

Q. Now, on the Warner Brothers picture BAD SEED, did you make a bid for that motion picture, Mr. Wren?

A. Yes, sir.

Q. Where did the picture play?

A. The picture played at the Mastbaum Theatre, Stanley Warner.

Q. How many bids did you make for it?

A. Two bids.

Q. Were both of them rejected?

A. Yes, sir.

Q. Now, as a result of this same computation, less advertising, what did Warner Brothers receive from the Mastbaum for the showing of this motion picture, how much money?

A. A net film rental of $25,340.12.

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(3372)

Q. Under the first bid what would they have received?

Let me get this figure because it is verbal and it is broken up and I will put this on.

This is BAD SEED, right?

A. Yes, sir.

Q. And you testified that the net from the Mastbaum was

(3373)

$25,340.12?

A. Right, sir.

Q. The first bid at the Viking—

A. The first bid at the Viking, Warner Brothers would receive $33,644.02.

Q. Now, on the second bid of the Viking.

A. Under the second bid of the Viking they would have a net film rental of $28,883.61.

Q. And under the first bid how much more would Warner Brothers have received?

A. $8303.90.

Q. And on the second bid how much more?

A. $3542.49 more.

Mr. Wolf: That is assuming, of course, the same gross.

By Mr. Sawyer:

Q. Was the highest weekly gross of the exhibition of the BAD SEED at the Mastbaum higher or lower than the highest weekly gross attained by the Viking?

A. Lower. It was $31,827.06.

Q. Now, the Warner picture TOWARD THE UNKNOWN, Mr. Wren. Did you make a bid on that motion picture?

A. Yes, sir.

(3374)

Q. Where was it exhibited?

A. At the Goldman Theatre.

Q. How many weeks did it play?

A. Two weeks and one day.

Q. The highest weekly gross?

A. $11,172.52.

Q. What was the net received by Warner Brothers from the Goldman Theatre for the exhibition of that motion picture?

A. $2109.51.

Q. What was the net which would have been received by Warner Brothers had the picture been licensed to the Viking Theatre under its terms?

A. $6250.05.

Q. How much more would the distributor have received under those conditions?

A. The Viking would have paid $4140.54 more to Warner Brothers.

Q. Now, I invite your attention to the motion picture GIANT, Mr. Wren.

Mr. Goffman: Your Honor, may I make this objection as to GIANT? I called it to your attention before. This is the picture that though licensed during the period of this suit was exhibited after the period of the suit, and the matters of performance have been ruled out in your pretrial discovery as early as 1958, I think, Your Honor, and

(3375)

to adhere to that rule then the performance of this particular picture since being out of the period should not be before us.

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(3376)

Mr. Goffman:

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Your Honor also ruled that the performance of pictures at the Viking Theatre after the period in suit are not before us at this time. You ruled that at an earlier stage in the discovery proceeding. Therefore,

there was no discovery as to anything that happened in the Viking after November 13, 1956, anything that happened at our theatres after that date. For that reason, Your Honor, we press that nothing should be gone into as to performance of any of these pictures after November 13. The fact that it was not awarded to him is in the case and, that, of course, we will have to—

Mr. Sawyer: Your Honor, I still think it is exactly what we wrote a brief on, but I will say a word.

Our complaint is that it wasn't licensed to us, that it was a very big motion picture, that we made a bid for it and it wasn't licensed, and our complaint here was that our bid, the same thing, would have produced more film rental. Now, the fact that we have to look to a period after the close

(3377)

of the suit to see what the film rental was is immaterial. The complaint is that during the period of this suit we made a bid which should have been accepted by the distributor if they were pursuing their best economic interest, and that is what is in the suit and that is the complaint.

The Court: Yes, but I would be glad to rule on it except that I am told and informed that I have already ruled out performance on pictures bid for before the end of the period in suit but exhibited after. I am told by Mr. Goffman that I ruled it out, so far as performance is concerned, so far as gross receipts are concerned.

Mr. Sawyer: I don't know about that.

The Court: Where did I do that?

Mr. Goffman: I was right, Your Honor, and the ruling was made on April 8, 1959, your pretrial order of April 8, 1959.

The Court: Which one was that?

Mr. Goffman: I can't give you the exact number, Your Honor, but that was the ruling where you limited all discovery to the very date of November 13, 1956, at the plaintiff's insistence. That was at the plaintiff's insistence.

Mr. Sawyer: Limiting discovery, what has that got to do with it?

(3378)

Mr. Goffman: I don't have the ruling.

The Court: What is the date of it?

Mr. Goffman: The context of it, April 8, 1959, was a request for discovery through interrogatories.

The Court: Yes, that could have been.

Mr. Goffman: There was a ruling on interrogatories, Your Honor.

The Court: Yes. It couldn't have been a pretrial.

Mr. Goffman: A ruling on interrogatories, April 8, 1959. There was a request for discovery and Your Honor ruled that neither of us could go beyond November 13, 1956, as to the performance of any theatre.

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Mr. Goffman: Your Honor, it has just been handed to me. Here is the order of—I am sorry, Your Honor, the

(3379)

argument was on April 8, and the order was April 15, 1959.

The latter part of Your Honor's order—

The following order rules upon plaintiff's objections to certain numbered interrogatories by the defendant, number so-and-so, and so on.

Objections are overruled except that plaintiff's answers may be confined to the period from January 1, 1954, to November 13, 1956, which was the date of the suit and therefore denied us any discovery as to the performance.

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(3385)

The Court: I will sustain the objection.

By Mr. Sawyer:

Q. Mr. Wren, I would like to ask you one question with respect

(3386)

to GIANT since you did not have the information when you were previously on the stand, and that is what was the gross national film rental of the motion picture GIANT.

A. $11,900,000.

Q. It doesn't compare play-offs or anything else.

Was there a written guarantee offered by the Viking for that motion picture?

A. Yes, sir.

Q. What was the amount?

A. $65,000.

Q. Was there any guarantee offered by the Mastbaum Theatre?

A. No, sir.

Q. Now, as to the motion picture STRANGE LADY IN TOWN, who produced that motion picture?

A. Warner Brothers.

Q. And did the Viking offer a guarantee on that motion picture?

A. Yes, sir.

Q. What amount?

A. $5,000.

Q. Where was the picture awarded?

A. To the Stanley Theatre.

Q. What was the net film rental paid to Warner Brothers for

(3387)

that picture?

A. $1,738.35.

Q. How much more would the Viking have paid on the basis of the same gross?

A. $3261.65.

Q. By the way, what was the top weekly gross of that exhibition?

A. $9014.63.

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Q. Mr. Wren, with respect to the motion picture THE CAINE MUTINY, who produced that motion picture?

A. Columbia Pictures Corporation.

Q. And was that motion picture that you testified about, the

(3388)

effort to license it?

A. Yes, sir. No, I haven't testified.

Q. Was that during your time at the Viking Theatre?

A. No, sir, it was not.

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Q. Did the Viking actually proceed to license that motion picture?

A. It did.

Q. Where did the picture actually play?

A. At the Randolph Theatre, sir.

Q. How many weeks did it play at the Randolph Theatre?

A. Nine weeks.

Q. What was the highest single weekly gross?

A. $71,538.52.

Q. Has the Viking Theatre ever attained that high a gross in any single week?

A. No, sir.

Q. What was the total gross of the motion picture?

A. $237,604.18.

(3389)

Q. Now, how could the Viking attain such gross?

A. By playing additional weeks.

Q. I invite your attention to the motion picture the COUNTRY GIRL. Do you recall what the gross of that motion picture was?

A. $243,000.

Q. Where did that motion picture play?

A. At the 994-seat Midtown Theatre.

(3390)

Q. Now, what film rental was paid by the Randolph Theatre to Columbia for the exhibition of that motion picture?

A. $145,983.61.

Q. Now, have you done the same thing, Mr. Wren—have you applied to the grosses here the terms of the Viking Theatre to this total gross to see what film rental would have been achieved—

A. Yes, sir.

Q. —at the Viking Theatre if the same gross had been obtained?

A. Yes, sir. On a 14 run—

Q. What is that, please?

A. —14-week run basis the film rental returned by the Viking Theatre to Columbia Pictures would have been $150,300.

Mr. Ward: In how many weeks, Mr. Wren?

Mr. Wolf: Fourteen weeks.

The Witness: Fourteen weeks.

By Mr. Sawyer:

Q. And how much more would that have been, then, to Columbia?

A. $4316.39 more.

Q. And was there a written bid on that by the Viking?

A. Yes, sir.

(3391)

Q. And was there any bid by the Randolph?

A. No, sir.

Q. Was there any oral bid by the Randolph?

A. No, sir.

Q. And did the Viking also offer a guarantee on that picture?

A. We did.

Q. How much?

A. $60,000.

Q. Was there any guarantee offered by the Randolph?

A. No, sir.

Q. Now, on the Columbia picture PICNIC—

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(3392)

Q. Now, what was the distributor of that?

A. Columbia Pictures Corporation.

Q. All right. Did you make an offer? Did the Viking Theatre make an offer for that motion picture?

A. We did.

Q. And was that offer accepted?

A. No, sir.

Q. And was the offer in writing?

A. Yes, sir.

Q. And where did the picture play?

A. First at the Randolph Theatre and then was moved over to the Midtown Theatre.

Q. Was there a written bid for the picture by the Randolph Theatre?

A. No, sir.

Q. Was there an oral bid by the Randolph Theatre?

A. No, sir.

Q. Was there a written bid by the Midtown Theatre?

(3393)

A. No, sir.

Q. Was there a written or oral bid by the Midtown Theatre?

A. No, sir.

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(3410)

Q. Did the Viking offer a guarantee on this picture?

A. Yes, sir.

Q. In writing?

A. Yes, sir.

Q. In what amount?

A. $27,500.

Q. Was any guarantee offered by either the Randolph or the Midtown?

A. No, sir.

Q. Did the motion picture play at the Randolph?

A. It did.

Q. Did it also play at the Midtown?

A. Yes, sir, following the Randolph engagement.

Mr. Sawyer: The only—

By Mr. Sawyer:

Q. What was its gross when it played at the Randolph?

A. In the seven-week period it played at the Randolph, that is, from February 21 to April 10, 1956, it grossed $147,599.52.

(3411)

Q. Did it then move directly to the Midtown?

A. It did.

Q. What was its gross at the Midtown?

A. From April 11, 1956, to May 8, 1956, it grossed $33,866.89.

Q. What was the total gross?

A. The total for both of the engagements—

Q. Yes?

A. —was $181, 466.41.

Q. Are both these theatres owned by the same corporation?

A. Yes, sir.

Q. What was the total film rental paid by the engagement of both theatres?

A. $93,813.28, less advertising of $17,948, leaving a net film rental for both engagements of $75,865.28.

Q. Did you calculate the film rental which would have been paid, less advertising, at the Viking, had the same gross been obtained for the full run of this motion picture for the full number of weeks played at both theatres?

A. Yes, sir.

Q. What would that amount have been net?

A. Net, $91,490.89.

Q. How much more then would the Viking have paid?

A. $15,625.61 more.

Q. One other point I would like to ask you, Mr. Wren, with

(3412)

respect to this engagement. You told me that the run of the motion picture was consecutive right through the Randolph and Midtown without interruption in time?

A. Yes.

Q. Just give me the figures, without taking them all the way out, the thousands figures of the gross for each week right through, at the Randolph, and then the Midtown.

A. The first week at the Randolph, $38,910.
Q. No, no, just the $38,000.
A. $38,000.
Q. Yes?
A. $28,000 the second week.
Q. Yes?
A. $20,000 the third week.
$13,000.
$16,000.
$17,000.
$12,000.
$10,000.
$9,000.
$7,000.
$5,000.

Q. Where should I draw the line between the Randolph and the Midtown, at what point did it move over?

(3413)

A. At the $10,000 gross.
Q. Between ten and what?
A. Ten and twelve.

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Q. Now, the first question, Mr. Wren, SOLID GOLD CADILLAC, who produced it?
A. Columbia Pictures.

(3414)

Q. Where did it play?
A. Mastbaum.
Q. Did the Viking offer a guarantee?
A. Yes, sir.

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Q. Did the Mastbaum offer a guarantee?
A. Yes, sir, $25,000.
Q. What did it pay the film company, Columbia?
A. $25,000.01.

Q. And one cent? All right.

A. Yes.

Q. What gross did the picture obtain at the—

A. $55,822.30 in four weeks and one day.

Q. And did you apply to those grosses the Viking terms?

Mr. Wolf: Wait a minute. He has not said the Viking had made any offer or bid.

By Mr. Sawyer:

Q. Did it make an offer or bid, Mr. Wren?

A. We tried to present it and we were told at 4:00 o'clock in the afternoon the picture had been awarded to the Mastbaum Theatre.

(3415)

Q. And did you leave the bid with the distributor?

A. We were in negotiating with the distributor.

Q. I am trying to ask, was the distributor—

A. We were offering, bidding, or negotiating with Columbia.

Q. Did the distributor have in his hands at any time, did he have your offer, bid, or negotiation.

A. He was writing down the offer, or bid, or negotiation.

Q. Very well. If the Viking bid had been accepted, and the Goldman grossed the same amount, what would it have paid to Columbia?

Mr. Wolf: He has not said that there was any bid yet, or an offer, or a negotiation, which would arrive at any figures.

By Mr. Sawyer:

Q. I will ask you again, Mr. Wren, did Columbia Pictures, or its representative, have in their hands at any time prior to licensing of this motion picture the terms that were offered by the Viking Theatre?

A. Yes, sir.

Q. All right, then. Had those terms been accepted and the gross had been the same what would Columbia have earned on the showing of that picture at the Viking?

A. $30,403.37.

Q. How much more would that have been than what was earned

(3416)

at the Mastbaum?

A. $5,403.36.

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(3417)

TWENTY-FIRST DAY

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(3419)

JAY WREN—resumed.

DIRECT EXAMINATION (continued)

By Mr. Sawyer:

Q. Now, Mr. Wren, with respect to certain of United Artists Pictures, did the Viking submit a bid on the picture BAREFOOT CONTESSA?

A. Yes, sir.

Q. And the distributor was whom?

A. United Artists, sir.

Q. Was the picture awarded to the Viking?

A. No, sir.

Q. To whom was it awarded?

A. Just a moment, please, sir.
It was awarded to the Midtown Theatre.

Q. Was there any written bid by the Midtown Theatre?

A. No, sir.

Q. Was there any oral bid?

A. No, sir.

Q. Now, what was the highest weekly gross of the BAREFOOT CONTESSA?

A. $22,606.77.

Q. Has the Viking Theatre exceeded that weekly gross in any given week of its performance?

(3420)

A. Yes, sir.

Q. What was the total gross of the BAREFOOT CONTESSA at the Midtown Theatre?

A. $100,269.58.

Q. How much film rental was paid by the Midtown to the distributor, United Artists?

A. $47,320.82.

Q. Did you apply to the gross the terms offered by the Viking?

A. I did.

Q. To determine what film rental would have been offered by the Viking?

A. Viking would have paid $47,975.79.

Q. Was there a written guarantee offered by the Viking?

A. Yes, sir.

Q. Was there any guarantee offered by the Midtown?

A. No, sir.

Q. How much more would Viking have paid to the distributor for the film if the film had been awarded to the Viking and the gross achieved the same?

A. The Viking would have paid $654.07 more to United Artists.

Q. Now, with respect to the motion picture SUMMERTIME, who was the distributor of that motion picture?

(3421)

A. United Artists.

Q. Did the Viking bid on that motion picture?

A. We did.

Q. Was there a written bid?

A. Yes, sir.

Q. Was there any bid by the Randolph Theatre?

A. No, sir.

Q. Was that where it played finally?

A. Yes, sir.

Q. Now, how many weeks did SUMMERTIME play?

A. It played four weeks at the Midtown—at the Randolph Theatre.

Q. What was the gross achieved?

A. $53,771.77.

Q. What was the film rental paid by the Randolph Theatre to United Artists?

A. $22,608.26, less advertising of $3,627, leaving a net film rental of $18,981.26.

Q. Under the bid that was offered by the Viking Theatre, applied to that gross, what would the film rental have been?

A. $30,501.91, less advertising totaling $6,363, leaving a net film rental of $24,138.91.

Q. How much more would have been paid by the Viking to the distributor had the Viking bid been awarded and the same

(3422)

gross achieved?

A. The Viking would have paid $5,152.65 more to United Artists.

Q. Was there a written guarantee offered by the Viking Theatre?

A. Yes, sir.

Q. In what amount?

A. $12,500.

Q. Was there any guarantee offered by the Randolph Theatre?

A. No, sir.

Q. Now, on the motion picture GENTLEMEN MARRY BRUNETTES, who was the distributor of this motion picture?

A. United Artists.

Q. Did the Viking make an offer on this motion picture, or a bid?

A. Yes, sir.

Q. To whom was the picture awarded?

A. To the Stanley Theatre.

Q. How many weeks did it play?

A. Two weeks.

Q. What was the gross?

A. $19,994.22.

Q. And the film rental paid to United Artists by the

(3423)

Stanley?

A. $7,587.95.

Q. Now, did you apply to the gross of the Stanley Theatre the terms offered by the Viking?

A. Yes, sir.

Q. What would the film rental have been for the exhibition of that motion picture, had it been awarded to the Viking and the same gross achieved?

A. $8,418.46.

Q. How much more would the Viking have paid to United Artists?

A. $830.51.

Q. Was there an adjustment given by United Artists to the Stanley Theatre on that motion picture?

A. Yes, sir, $104.

Q. Now, on the motion picture AMBASSADOR'S DAUGHTER, Mr. Wren, by whom was that distributed?

A. United Artists.

Q. Did the Viking bid on that motion picture?

A. Yes, sir.

Q. Where did it play finally, Mr. Wren?

A. It played at the Randolph Theatre.

Q. How many weeks?

A. Three weeks.

(3424)

Q. What was the total gross?

A. $33,822.71.

Q. How much film rental was paid?

A. $11,649.60.

Q. Did you apply to that gross at the Randolph Theatre the terms offered by the Viking?

A. I did.

Q. On the basis of that gross having been achieved, what would the film rental have been if the Viking had been awarded the picture?

A. $12,946.84.

Q. How much more would that have been if the Viking had been awarded the picture?

A. $1,297.24 more to United Artists.

Q. Was there any bid by the Randolph Theatre on that motion picture?

A. No, sir.

Q. Now, turning to Universal, with respect to the motion picture FOX FIRE, did the Viking offer a guarantee on that motion picture?

Mr. Ward: Will you wait just a minute, please, until I get my papers, Mr. Sawyer?

Now, sir, I object to any interrogation with respect to this motion picture because the offer made by the

(3425)

Viking Theatre was withdrawn, as shown through the evidence in this case.

Mr. Sawyer: Yes, sir, that is true. It was ultimately withdrawn. Our contention is that it was withdrawn after a reasonable length of time, and that the dis-

tributor should have accepted it, it being a superior offer, during that period. It was ultimately withdrawn, I think, after 14 days.

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(3427)

Mr. Ward: It also appears, sir, in the interrogation of this witness in cross-examination by Mr. Nizer that the offer for FOX FIRE was withdrawn because they were booked in for NOT AS A STRANGER.

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Mr. Sawyer: In this business, Your Honor, you cannot have bids outstanding for very long because while your bid is outstanding you can't move, because if you went after another picture and got that you would end up with two commitments for the same time. I mean you would have—

The Court: What is your contention, Mr. Sawyer—

Mr. Sawyer: They should have accepted.

The Court: —that when the Viking submits a bid it should be accepted immediately?

Mr. Sawyer: No.

The Court: It should be accepted?

Mr. Sawyer: Within a reasonable length of time.

(3428)

The Court: What is a reasonable length of time?

Mr. Sawyer: Well, I don't know as I can say that today.

The Court: What is the practice?

Mr. Sawyer: Less than thirteen days is a reasonable length of time is all I can say, Your Honor.

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(3431)

The Court: I will sustain the objection on the grounds the bid was withdrawn.

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(3433)

(The following transpired at side bar:

Mr. Sawyer: I offer to prove that during the period in suit the Viking Theatre made a bid for the Universal picture WRITTEN ON THE WIND, that it offered a $22,500 guarantee—excuse me, that it offered a $20,000 guarantee, that the bid was rejected and the picture was awarded to the Mastbaum Theatre. That it there grossed $84,879.64 in six weeks, that the film rental paid by the Mastbaum to Universal was $30,047.27, that had the Viking bid been accepted, under the terms offered by the Viking, and the same gross achieved, the Viking would have paid $34,036.99, or an amount of $3989.79 more.

Mr. Wolf: Mr. Sawyer, you forgot to say that the Mastbaum made a guarantee of $22,500 against your $20,000.

Mr. Sawyer: The Mastbaum made a guarantee of $22,500.

Mr. Wolf: Against your $20,000.

Mr. Ward: And I think Mr. Sawyer—

Mr. Sawyer: Now, on the motion picture FOX FIRE—

The Court: Wait. Is this another?

Mr. Sawyer: Well, I would like to make an

(3434)

offer of proof on FOX FIRE too.

Mr. Ward: Let us take one at a time.

The Court: Well, you object to it.

Mr. Ward: I just want to say this. I did not hear Mr. Sawyer say—he may have—but I didn't hear him say the play dates of the picture WRITTEN ON THE WIND, and I suggest for the record that based upon the statements furnished us by Mr. Sawyer the play dates commenced on December 29, 1956, some six weeks after the termination of the suit period with which we are concerned, and ran until February 8, 1957.

For the reasons stated at the bar of the court I object to the offer on the same grounds that Your Honor ruled in the case of the film GIANT.

The Court: In other words, as I understand it, Mr. Sawyer, in this case Viking made a bid before November, whenever it was—

Mr. Sawyer: Yes, sir.

Mr. Ward: Yes, sir.

The Court: —1956.

Mr. Sawyer: Yes, sir.

The Court: And the actual playing time of the picture at the Mastbaum was some weeks after that time. Is that correct?

(3435)

Mr. Sawyer: Yes, sir. I understand. That is an offer of proof. My point is that the wrong being complained of is the failure to award the bid and not the play date.

The Court: Very well. I will sustain the objection for the reason as I indicated previously. We had the same problem as to GIANT and I think that it cannot

be compared because it is outside the time of the period of suit.

Mr. Sawyer: Now, on the motion picture FOX FIRE, distributed by Universal, I offer to prove that the Viking made an offer, that it waited thirteen days and then withdrew the offer, that the picture was licensed to the Mastbaum Theatre, that the Viking's offer was to have included a written guarantee of $8000, and that the film rental received by the distributor Universal for the exhibition at the Mastbaum was $2328.87, and that there was an adjustment on that picture of $869.

Mr. Ward: I object to that offer, Your Honor, for the reasons I stated at the bar of the court, namely, that the evidence shows that the Viking's offer for the motion picture FOX FIRE was voluntarily withdrawn by it, and also because under the admission of the witness Wren, he could not have played the picture in any event, because

(3436)

of commitments on other films.

I do not want to argue it. I am simply stating my objection.

Mr. Sawyer: He has already said that. It has been sustained. In an offer of proof—let me put it on, because we will have this record at an ungainly length, it would be just repeated. It was sustained.

The Court: All right, the objection is sustained.

Mr. Sawyer: On the motion picture BETWEEN HEAVEN AND HELL, Your Honor, Twentieth Century-Fox, we have a picture that commenced playing before November 13 and carried over until afterwards.

What is Your Honor's pleasure?

The Court: When did it commence playing?

Mr. Sawyer: The 9th of November.

You understand, of course, the bid rejection was prior. The bid rejection was prior.

The Court: Yes, of course, it would be.

Now, when is our period?

Mr. Sawyer: It goes until November 13.

The Court: What is the date in July?

Mr. Sawyer: July 2.

Mr. Ward: July 2. That was the date the

(3437)

theater opened.

The Court: July 2 to November 13, is that right?

Mr. Sawyer: Yes, sir.

The Court: This picture started playing on the 9th.

Mr. Sawyer: Yes, sir.

The Court: How long did it play?

Mr. Sawyer: It played until the 20th.

The Court: Of November?

Mr. Sawyer: Yes, sir.

The Court: Do you object to that?

Mr. Ward: Yes, sir.

The Court: Why?

Mr. Ward: Because only four days of the suit period with which we are concerned are embraced by the period of the exhibition and it would be unrealistic to attempt any comparison on the basis of these facts

where the exhibition was for a period of some two weeks after the end of the suit period, which embraced only about four days, the richest first week play, four days of the first week play in the initial part of the exhibition. It is an unrealistic basis of comparison, and I do not think you can compare in a fragmented way. You have to compare entire exhibitions or none.

(3438)

The Court: I will overrule the objection as to that.

Mr. Sawyer: All right, sir.

The Court: Are there any others?

Mr. Sawyer: Yes, sir, there is another one like that. JULIE is like that and DEATH OF A SCOUNDREL.

The Court: First of all, JULIE, when did it start to play?

Mr. Sawyer: 11/15. That is after the period. Oh, I am sorry.

The Court: Are we going to take up JULIE?

Mr. Sawyer: No, sir, because Mr. Steinberg misunderstood. He thought I meant like the first one.

Well, we have an offer on JULIE, yes.

I offer to prove that as to Loew's motion picture JULIE the Viking bid prior to the close of the suit period, and that bid was rejected prior to that period, and that on the 14th of November JULIE opened at the Stanton Theatre.

The Court: Where?

Mr. Sawyer: Opened at the Stanton Theatre.

The Court: On November 14?

Mr. Sawyer: Yes, sir, and that it there played three weeks and three days, and it achieved a gross of

(3439)

$25,657.18, and paid to Loew's a film rental of $10,658.65. If the Viking had been awarded that picture under the terms offered by the Viking the film rental would have been $12,548, or $1889.35 more to the distributor.

The Court: You object to that offer for the same reason?

Mr. Ward: I object to that offer for the same reason as in the case with the film WRITTEN ON THE WIND.

The Court: I will sustain the objection.

Mr. Ward: What was the name of that picture, please, that last one of Loew's?

Mr. Sawyer: JULIE.

Mr. Ward: All right.

(3440)

Mr. Sawyer: I won't argue this thing again, Your Honor, but this ruling is wrong, sir, because we are complaining as a wrong. It is a wrong and the wrong takes place within the suit. The play date is just a method of demonstration. The wrong takes place when the bid is rejected if it is superior. I really think, Your Honor, that is—I won't press it.

Mr. Ward: This can't be characterized as a wrong. This is a theory only on comparison which Your Honor has admitted into evidence over vigorous objection. It doesn't establish, Your Honor, or tend to. This has been argued by counsel for Warner Bros. Pictures Distributing Corporation, by Mr. Wolf, and all other lawyers, and I just don't think it ought to be re-argued.

Mr. Sawyer: Well, the point of the time is this was just argued very briefly yesterday, but I have no

way to establish my wrong on these pictures. I am utterly precluded here. Here are wrongs done me, I say, during the period of the suit, and I can't—I have no way to establish that, because how is it a wrong? How can I compare it? Because I can't show this. The wrong took place just in my period.

Mr. Ward: He has got two years and four

(3441)

months within which to attempt to prove his case.

Mr. Sawyer: Suppose I had ten, Mr. Ward.

Mr. Ward: We are just talking now about the peripheral ends of this. Your Honor has weighed it and considered it and after mature consideration has decided it. Now, I think that there ought to come an end to these repeated renewals of contentions after Your Honor has ruled.

Mr. Sawyer: This isn't the subject we had the long arguments on. This was just an offhand ruling yesterday afternoon on one picture.

Mr. Ward: No. It was argued generally.

The Court: No. It was argued pretty thoroughly and I was convinced from the record—

Mr. Sawyer: It was just Mr. Goffman at the time, wasn't it?

The Court: Yes. That is right.

Mr. Sawyer: That was very brief, Your Honor. It wasn't that long argument we had before, I meant.

The Court: No, no. It wasn't anything like that. But I was convinced then and persuaded because of the fact that you on behalf of the plaintiff or your predecessors had objected to the inquiry—

Mr. Sawyer: Discovery, Your Honor.

(3442)

The Court: —in discovery that the defendants wanted to show it up to December 31st and—

Mr. Ward: There were many areas into which we wanted to go after November 13th. We were foreclosed from it. Now, it cuts both ways. You can't have it—the plaintiff can't have it both ways. They can't deny us what we sought after November 13th and have what they seek after November 13th.

Mr. Sawyer: It is not a question of discovery, Your Honor. That is a different thing. Here I come to a wrong and the wrong is done me during the period of the suit and I can't prove my wrong on these pictures. Now, that just seems to me it is basic.

Now, as for housekeeping purposes, to rule that discovery has got to stop somewhere and not go on and on, I quite agree, but this has its own self-limitation imposed, you see, otherwise the discovery would go up to date and I can see how Your Honor would say, "Well, that could go on endlessly," but this is self-limiting, because obviously if the bid wasn't rejected prior to the end of the suit, well I have no complaint—the wrong wasn't done me during the suit period—but here a wrong is done me during the suit period, and in the nature of things there is no other

(3443)

way to prove it, except by reference to it.

The Court: I adhere to my ruling.

Mr. Sawyer: Yes, sir.

(End of side bar discussion.)

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(3448)

By Mr. Sawyer:

Q. Now, Mr. Wren, with respect to the motion picture LEFT HAND OF GOD, by whom was that distributed?

(3449)

A. Twentieth Century-Fox Film Corporation.

Q. And did the Viking bid on that motion picture?

A. We did.

Q. And was its bid accepted?

A. No, sir.

Q. Where did the motion picture play?

A. Stanley Warner Mastbaum.

Q. And how many weeks did it play there?

A. Four weeks and three days.

Q. And what was the total gross achieved at the Mastbaum Theatre?

A. $66,100.72.

Q. And what was the earned film rental on that gross?

A. $22,666.16.

Q. What did the Mastbaum pay to Twentieth Century-Fox?

A. A $30,000 guarantee.

Q. And was there advertising deducted from that amount?

A. Yes, sir.

Q. And what was the net received by Twentieth Century-Fox?

A. $26,207.

Q. Now, under the terms of the Viking bid, did you apply those terms to the gross achieved at the Mastbaum Theatre on LEFT HAND OF GOD?

A. Yes, sir.

(3450)

Q. And what would the earned film rental have been assuming that gross?

A. $35,686.90, less advertising of $7,000, for a net film rental of $28,686.90.

Q. And was that advertising in the case of this motion picture, your $7,000, an estimate?

A. Yes, sir.

Q. And how much more, therefore, would the Viking have paid to Twentieth Century-Fox under these circumstances?

A. $2,479.90.

Q. Now, with respect to the Twentieth Century-Fox motion picture THE TALL MAN, did the Viking bid on that picture?

A. Yes, sir.

Q. And was it awarded to the Viking?

A. No, sir.

Q. To whom was it awarded?

A. The Fox Theatre.

Q. And how many weeks did it play?

A. Four weeks.

Q. And what was the total gross?

A. $78,325.62.

Q. What film rental was paid by Fox Theatre, Twentieth Century-Fox?

A. $29,506.33.

(3451)

Mr. Sawyer: May I suggest, if there is no objection, that the witness henceforth leave off the last dollars and cents?

Mr. Nizer: Surely.

By Mr. Sawyer:

Q. Round off to the nearest hundred, Mr. Wren. Don't round off. Just give the nearest number. I think it makes less in the record.

Now, as respect to this same motion picture, THE TALL MAN, did you take the terms of the Viking bid and apply it to this gross?

A. Yes, sir.

Q. And what film rental would have been paid under the Viking bid assuming the same gross?

A. $36,300.

Q. And the Viking would have paid to the distributor, then, how much more under these conditions than was paid by the Fox Theatre?

A. $6,800.

Q. Now, motion picture BUS STOP, Twentieth Century-Fox, did the Viking seek that motion picture?

A. We did.

Q. Did the Viking offer a guarantee?

A. Yes, sir.

(3452)

Q. Was there any guarantee offered by the Fox Theatre?

A. No, sir.

Q. Did it play the Fox Theatre?

A. Yes, sir.

Q. What was the gross achieved, total?

A. In three weeks $39,208.

Q. And what was the film rental paid by the Fox Theatre to Twentieth Century-Fox?

A. $19,600, less advertising of $4600, leaving a net of $14,900.

Q. And with the same computation, without repeating it, Mr. Wren, what would the net have been to Twentieth Century-Fox under the Viking bid?

A. $11,200.

Q. And, therefore, the Viking would have paid the distributor how much more?

A. We would have paid for because of the guarantee, thirty-six hundred.

Q. Less. I am sorry.

A. $3600 less because of the guarantee, including the guarantee.

Mr. Nizer: I don't think that is correct.

The Witness: No. You are right.

Mr. Sawyer: No. That is not correct.

(3453)

The Witness: You are right. We would have paid them more money.

Mr. Sawyer: Yes.

The Witness: We would have paid a hundred dollars more.

Mr. Sawyer: It is written here wrongly.

The Witness: Yes.

Mr. Sawyer: It say "Less" and you read it.

The Witness: We would have paid a hundred dollars more on this picture.

Mr. Young: Mr. Sawyer—I am sorry—his own figures show that his testimony, first testimony was right, that the Fox would pay more, because the guarantee was the distributor to pay all advertising, and if it is tantamount to advertising, it is obvious, if the figure is correct, that the Viking would have paid $3,600 less than the Fox Theatre paid.

Mr. Sawyer: Yes. It is a question of whether advertising comes off before the guarantee or not.

Mr. Young: Well, of course it does. Mr. Wren knows that.

The Witness: You are right.

Mr. Young: If the bid is $15,000, distributor to pay all advertising, of course, it comes off.

(3454)

Mr. Sawyer: All right. Then it would have been less. It is correct as written.

Mr. Young: Yes, correct as written.

By Mr. Sawyer:

Q. Now, the motion picture, THE BEST THINGS IN LIFE ARE FREE, Mr. Wren, Twentieth Century-Fox. Did the Viking bid for that picture?

A. We did.

Q. And was it awarded to the Viking?

A. No, sir.

Q. To whom was it awarded?

A. The Fox Theatre.

Q. And how long did it play there?

A. Three weeks.

Q. What was the total? What was the highest total it could gross there?

A. $17,000.

Q. What was the total gross?

A. $35,800.

Q. And what was the net received by the distributor for the exhibition of that motion picture at the Fox?

A. $9,900.

Q. Did you make the same computations here as you made previously?

(3455)

A. Yes, sir.

Q. And on the basis of those computations, what would the net have been from the Viking Theatre to Fox?

A. $12,600.

Q. And the Viking, therefore, would have paid how much more to Twentieth Century-Fox?

A. $2,700 more.

Q. Now, Mr. Wren, BETWEEN HEAVEN AND HELL, Twentieth Century-Fox, did the Viking bid on that motion picture?

A. Yes, sir.

Q. And where did it play?

A. The Fox Theatre.

Q. And what was the gross?

A. $20,900 in two weeks.

Q. And how much film rental?

A. No. I am sorry. 11 days.

Q. And how much film rental was paid by Fox Theatre to Twentieth Century-Fox for its HEAVEN AND HELL?

A. $4,900.

Q. Have you made the same computation as you have made previously?

A. Yes, sir.

Q. And what would the film rental have been under the Viking bid, assuming that system of computation?

(3456)

A. $7,900.

Q. The Viking would have paid, therefore, how much more to the distributor?

A. $2,900 more.

Q. And now, Mr. Wren, with respect to the motion picture GUYS AND DOLLS, who produced that motion picture?

A. Samuel Goldwyn.

Q. And who distributed it?

A. Loew's, Incorporated.

• • •

Q. Now, on the motion picture GUYS AND DOLLS, Mr. Wren, you say that was distributed by Loew's?

A. Yes, sir.

Q. Now, did the Viking offer a written bid on that motion picture?

A. Yes, sir.

Q. Where did it play finally?

A. At the Randolph.

Q. Was there any bid by the Randolph Theatre?

A. No, sir.

Q. Now, how long did it play at the Randolph? Do you have that record?

(3457)

A. Yes, from 11—November the 18th to February the 20th—November the 18th, 1955, to February the 20th, 1956, a period of 15 weeks.

Q. 15 weeks; and in the 15 weeks, Mr. Wren, what was the total gross?

A. $351,000.

Q. Now, were there weeks in that period where the gross achieved by the Randolph exceeded the highest weekly gross ever achieved by the Viking Theatre?

A. Yes, sir.

Q. How many were there of such pictures?

A. I believe there was only one.

Q. No. I show you the—

A. Three.

Q. Now, in assuming that the Viking Theatre would achieve this over-all gross, what would it be necessary for the Viking to do with respect to this motion picture?

A. Well, first, to play a longer time.

Q. And on the basis of that assumption, Mr. Wren, did you—well, let me ask you, first of all: What was the film rental paid to the Loew's for the exhibition of this picture?

A. $181,300.

Q. Now, assuming that the Viking played the picture a longer time and achieved this gross under the terms offered

(3458)

by the Viking in its written bid, what would it have paid to the distributor for the exhibition of GUYS AND DOLLS?

A. On a 16-week basis, $239,400.

Mr. Rome: How many weeks, Mr. Wren?

The Witness: 16 weeks.

By Mr. Sawyer:

Q. I didn't ask you how many weeks, because I think that—I made that and I think it is incorrect. I just asked the question—

Mr. Rome: Well, he gave an answer and I didn't hear the answer.

Mr. Sawyer: He said 16 weeks, but I don't think—

Mr. Rome: You say that is incorrect?

Mr. Sawyer: I don't think we can do it in 16 weeks. I think it would take three extra additional weeks.

Mr. Ward: Well, I wonder if Mr. Wren thinks that.

Mr. Sawyer: Well, I will ask him, because he—

The Witness: I believe we could.

Mr. Sawyer: Maybe he could.

The Witness: Yes, sir, because from the ninth

(3459)

week on 17, 16, 14, 13, 11, 10, 9—could be done.

Mr. Ward: What could be done? I don't understand the answer.

Mr. Sawyer: Could be done, he said.

Mr. Ward: Could be done?

The Witness: Yes, sir—could be done.

Mr. Rome: Now, are we to take Mr. Sawyer's comment or yours?

Mr. Sawyer: If the witness says he can do it, certainly it is his. I thought—he just read 16, and I was skeptical about it, and now he says he can do it in 16 weeks.

Mr. Lome: So are we all.

Mr. Sawyer: Well, all right.

By Mr. Sawyer:

Q. Well, let me—since we are in that, let me ask you this, Mr. Wren: I will take you up to date in a moment. Just give me—don't read off the last dollars—give me in thousands what these weekly grosses were in these 15 weeks.

A. First week was fifty-eight six, thirty-nine thousand seven.

Q. Yes.

A. 43,500, 25,900.

(3460)

Q. Well, all right. Let us not write them out. Now, from then on, there are how many more weeks? After these three, how many more weeks did it play?

A. Another 12.

Q. Another 12?

A. Yes, sir.

Q. Now, after those three are there any grosses there that exceed the best weekly gross that the Viking has done?

A. No, sir.

Q. And below that they are less than the 34,000 on NOT AS A STRANGER?

A. That is right, sir.

Q. And they go down to what weekly gross at the end?

A. The last week there is $9,100.

Mr. Sawyer: Very well.

Mr. Nizer: I still don't understand. How many more weeks does he say he would have?

Mr. Sawyer: Well, he says 16, and I just was demonstrating then after that the number of weeks that were above the best week that the Viking did on NOT AS A STRANGER.

Mr. Nizer: He said 16; is that correct?

Mr. Rome: Yes.

By Mr. Sawyer:

Q. Now, Mr. Wren,—

(3461)

A. Yes, sir.

Q.—on the motion picture, also Loew's, the motion picture THESE WILDER YEARS, of Loew's—

A. Yes, sir.

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(3462)

(The following transpired at side bar:)

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Mr. Sawyer: First of all, I would like to say that I need no instruction from Mr. Ward with reference to that. I have not yet in this trial and I shall not attempt to make offers of proof other than at side bar.

I appreciate his instruction, but I do not need it.

Now, on THESE WILDER YEARS, a picture dis-

(3463)

tributed by Loew's, I offer to prove that this was a motion picture which the Viking bid, and on which its bid remained extant for 15 days without being accepted or rejected, and the bid was therefore finally withdrawn, that if the bid of the Viking had been accepted it would have resulted in a film rental of $426.16 more to the distributor. I do not think there is any need to put any other figures in for the offer. That it would have resulted in a greater film rental than it actually achieved for that distributor when it played at the Mastbaum Theatre, where it grossed $8,500.

Mr. Ward: I object to the offer for the reasons previously stated.

Mr. Sawyer does not want me to argue it at side bar, so I shall not unless Your Honor wants me to.

The Court: Well, it poses the same problem we had before.

Mr. Wolf: I would like to add that it was not licensed to us until after the bid had been withdrawn by the Viking.

Mr. Sawyer: Well, when it was licensed is immaterial.

Mr. Wolf: I do not think so at all.

The Court: Sustained.

(3464)

(End of discussion at side bar.)

By Mr. Sawyer:

Q. Now, Mr. Wren, the Loew's picture TEA AND SYMPATHY.

• • •

Q. Now, did the Viking Theatre bid on that motion picture, Mr. Wren?

A. Yes, sir.

Q. Where was it awarded?

A. To the Randolph Theatre.

Q. Did the Viking Theatre offer a guarantee?

A. Yes, sir.

Q. How much was it?

A. $27,500.

Q. Was any guarantee offered by the Randolph?

A. No, sir.

Q. At the Randolph Theatre how many weeks did it play?

A. Five weeks and three days.

(3465)

Q. What was the highest weekly gross?

A. $23,600.

Q. What was the total gross achieved at the Randolph?

A. $69,500.

Q. Less advertising, what was the net received by the distributor from the Randolph Theatre?

A. $21,300.

Q. Have you made the same computation with respect to this as with others?

A. Yes, sir.

Q. What would the distributor have received under those circumstances from the Viking?

A. $27,300.

Q. How much more therefore to the distributor?

A. $6,000.

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(3466)

Q. Now then, to come back to GUYS AND DOLLS for a moment, Mr. Wren.

I believe you have a computation there in which it is assumed that the gross of the Viking Theatre for the first three weeks instead of being, say, $5,839.43, was $34,600, that being the gross of NOT AS A STRANGER, $32,700 and $30,500, and that you never made that up, that the total gross achieved therefore at the Viking would have been on that basis what?

A. $315,000.

Q. $315,000?

(3467)

A. Yes, sir.

Q. The intervening weeks here being the same.

Now, on the basis of this gross what would the film rental have been under the Viking bid?

A. $200,800.

Mr. Ward: Now, if Your Honor pleases, this I take it is a departure from the area of the comparison which Your Honor allowed to be made over our objection.

Now we are getting into the realm of assumptions by the witness that he would not have achieved the grosses that the Randolph achieved in the first three weeks of the exhibition of this picture. Now we are jumping from one rather suggestive field into another, which is a subjective area compounded by assumptions, and I do think this is going pretty far when he assumes that he would not have achieved the grosses of the Randolph for the first three weeks of its exhibition, and then to project that into some formula which would bring some other result.

I object to it for that reason. It is not the formula that Your Honor permitted to be developed here by applying the Viking's terms to the results achieved by its competitor. That was the area within which Your Honor permitted this to be done.

Now, I do not think it is appropriate or

(3468)

proper in that area to change those figures and to make assumptions as to what the Viking would or would not have done.

It has either got to be on the basis of the Viking would have achieved the same gross, and that is the whole tenor of all these comparisons, or it can't be done at all. That is my position, sir.

The Court: How do you answer that, Mr. Sawyer?

Mr. Sawyer: Oh, I am sorry, Your Honor. I was trying to see whether we had covered all of these.

I did hear Mr. Ward start out by saying that we are entering a new realm, and I want to assure Your Honor that there will not be any new realm, because this will be only instances in which we will if necessary ap-

ply different assumptions of grosses lower than at any other theatre.

The Court: What is your theory? As I understand it, the Randolph grossed the first week around what amount, $50,000?

Mr. Sawyer: Yes, sir, $50,000.

The Court: Now, is it your theory that the Viking could not gross $50,000?

Mr. Sawyer: Yes, sir. We cannot gross $50,000 in one week.

The Court: So then you take the best week?

(3469)

Mr. Sawyer: But we did gross this on the picture NOT AS A STRANGER.

Now, my point is this: If we play it the extra time, the extra playing time, to achieve this gross, this is the comparison, these two figures, but then I say, well, let us assume that we can't, we will play it the same length of time. Let us assume that we can't, we can't make the $50,000. So I say that even under this series here of weekly grosses, our best one and last, even under that, and the lesser gross, you don't even take it out to the extra weeks to make up the difference—the lesser gross, the distributors would have gotten more even under that theory. That is the point.

The reason this is a special situation, of course, is this is the biggest picture played first-run Philadelphia in the period of time of the suit. It is the highest gross ever achieved first-run Philadelphia. That puts it in a rather special category.

Mr. Ward: Well, there is nothing special about it Mr. Sawyer said this is the only time he is going to do this, and then I promise Your Honor it is the only time

I am going to object to it, because it is just plain improper.

The Court: Well, it makes a lot of assumptions.

(3470)

There is no doubt about that, and, of course, it will be for the jury to see what weight they put on it, because we are assuming all the time that the Viking grossed the same as the other theatres, and, of course, it is agreed that the Viking could never have grossed $50,000 with this picture. But, as I say, the plaintiff's argument is that if it played over a longer period of time it would then make it up, while if it played only the same time it would only gross $315,000.

I will overrule the objection and restate to the jury, as I said;

You will have to decide what weight you give to all of this testimony, as I instructed you yesterday.

Proceed.

By Mr. Sawyer:

Q. Now, Mr. Wren, with respect to the Warner Bros. motion pictures which we did on the board yesterday, one of them was SERENADE.

I now ask you whether the record discloses as to whether or not an adjustment was granted by Warner Bros. in the exhibition of that motion picture.

A. Yes, sir.

Q. In what amount?

A. $188 to the Goldman Theatre.

(3471)

Q. And with respect to the Warner Bros. picture McCONNELL STORY, was there an adjustment granted to the Randolph Theatre?

A. Yes, sir, $1,017.

Q. And with respect to the Warner Bros. motion picture HELEN OF TROY was there an adjustment granted to the Mastbaum Theatre?

A. Yes, sir, $74.

Q. And with respect to the Warner Bros. motion picture BAD SEED was there an adjustment granted to the Mastbaum Theatre?

A. Yes, sir, $377.

Q. With respect to the Warner Bros. motion picture BLOOD ALLEY was there an adjustment granted to the Stanley Theatre?

A. Yes, sir, $241.

Q. With respect to the Warner Bros. picture STRANGE LADY IN TOWN was there adjustment given to the Stanley Theatre?

A. Yes, sir, $1,381.

Mr. Goffman: Mr. Sawyer, just to make it clear, those adjustments had already been deducted in the film rental you stated yesterday, is that right?

Mr. Sawyer: Yes, quite right.

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(3481)

CROSS-EXAMINATION

By Mr. Young:

Q. On your direct testimony today, Mr. Wren, you testified about a Twentieth Century-Fox picture called the TALL MAN licensed to the Fox Theatre.

A. Yes, sir.

Q. And you projected the gross of the Fox Theatre into your theater, isn't that a fact?

A. Yes, sir.

Q. And are you aware that the national gross, that is, the national film rental of that picture was $3.6 million, correct?

A. I will take your figures for it.

• • •

Q. That is substantially the same gross as GRAY FLANNEL SUIT, isn't it?

A. I accept your figures.

Q. It is true, isn't it?

A. All right, sir. I accept your figures.

Q. Then the gross on the first week at the Fox Theatre was

(3482)

$33,632.80?

A. Yes, sir.

Q. You never grossed that much for any picture at any time in your life except the $6 million picture called NOT AS A STRANGER, isn't that right?

A. Yes, sir.

Q. Now do you recall your bid on that picture, that is Plaintiff's Exhibit 137, Mr. Steinberg, if you would like to show it to him? I only have one copy or I would give you this, sir.

Mr. Sawyer: Do you have it in front of you?

The Witness: It is right here on the sheet, Mr. Young.

By Mr. Young:

Q. I don't think all the terms are there, Mr. Wren.

A. That's right.

Q. Because your bid was dated September 23, 1955, and the question I would like to ask you, the playing time for four weeks, is that not so?

A. Yes, sir.

Q. To follow the BIG KNIFE which is scheduled to open at the Viking Theatre on or about November 2, 1955, isn't that correct?

A. Yes, sir.

(3483)

Q. And you actually opened at BIG KNIFE on November 23, 1955?

A. Yes, sir.

Q. And I assume if you were awarded the bid you would have played it after the BIG KNIFE, according to your bid?

A. Yes, sir; yes, sir.

Q. Do you bear in mind the telegram that you received which was sent to you on September 19, 1955, with respect to the solicitation of offers on that picture, that is, bids on the TALL MAN?

A. I don't recall it, no, sir.

Q. Would it refresh your recollection if I told you that the telegram to you and to other interested parties from Mr. Diamond said that the screening of the TALL MAN: September 20 at 11:00 o'clock. Bids due Friday, September 23, not later than 10:30 a.m. and desirous of opening picture early October. Therefore please include a bid definite or approximate opening date.

A. I agree. We did that, sir.

Q. You agree with that?

A. I say we did that.

Q. You know the date it opened at the Fox Theatre, don't you?

A. October 7, 1955.

Q. Which was early October.

(3484)

A. Yes, sir.

Q. As the solicitation letter asking for early October bid.

A. Yes, sir.

Q. And your bid was to follow the BIG KNIFE which was then on September 23, 1955, was scheduled to open about November 2, '55?

A. Yes, sir.

Q. And which actually opened November 23, 1955?

A. 23rd.

Q. Now at that time you had quite a number of bids outstanding, did you not, you made a number of bids?

A. I don't recall.

Q. You made a number of bids in the month of September on pictures?

A. I don't recall, sir.

Q. I will see if I can refresh your recollection. On August 28 you bid on LUCY GALLANT to open on the the 27th, October 26 I believe it was, and that was moved up to—you testified to that at the request of somebody.

A. I believe that opened October 6.

Q. 6th, October 6, that's right. That is the day, and the TALL MAN, October 7, opened at the Fox Theatre. You are playing LUCY GALLANT.

A. Yes, sir.

(3485)

Q. And you also on September 7, 1955, put in a bid for BLOOD ALLEY for three weeks, did you not?

A. I don't recall, sir.

Q. Well, I assure you that you did. That is Plaintiff's Exhibit 39—if, Mr. Steinberg, if you want to follow that. Now you also put in a bid in the same month of September on GENTLEMEN MARRY BRUNETTES, did you not?

A. I don't recall, sir. I may have.

Q. That is Plaintiff's Exhibit 82. If available on or before September 22, 1955. Then on September 20, 1955, you submitted a bid for DESPERATE HOURS, and that bid, as you know, was rejected, and so they would not negotiate with you, but you had a bid in on that picture, did you not?

A. Yes, but what are the available dates?

Q. I am not talking about that.

A. I may have, yes, sir.

Q. I am just asking you if you bid.

A. If I bid? I did, yes, sir.

Q. You set the availability date of GENTLEMEN MARRY BRUNETTES two weeks minimum if available on or before September 22, 1955, correct?

A. I would like to see the bid, sir.

Q. Exhibit 82.

A. It is right here.

(3485a)

Q. Two weeks, isn't that your bid on that picture, that is right there?

A. Two weeks if the picture is made available on or before September 22, right.

Q. Yes, sir.

(3486)

Q. That is right; now, in your bid on TALL MAN, you specified a playing time of four weeks, which, as we know, was the playing time at the Fox Theatre; that is how long it actually played, isn't that correct, if you look at your slip there?

A. Yes, sir.

Q. And you specified that if a third week's gross equals or exceeds $16,500, the picture will be held for a fifth week; that is what your bid said. Look at 137, if you have any doubts about it.

A. I got it right here.

Q. Now, any picture that you ever played, did you ever gross that much in the third week?

A. I believe we did on STRANGER certainly. I believe STRANGER, the third week, was $18,000.

Q. And that is the only one, isn't it?

A. I am not sure of FLANNEL SUIT, sir. I haven't—I don't have my figures here.

Q. Well, that is the one I will tell you. That is the only one where you ever grossed $16,500 in the third week; isn't that right?

A. The NOT AS A STRANGER?
Q. That is right.
A. Yes, subject—

Mr. Sawyer: Do you want this?

(3487)

The Witness: Yes. May I have that, please?

Mr. Young: Oh, sure. That is 176, I believe, isn't it, Mr. Sawyer?

By Mr. Young:

Q. Then you say if the fourth week's gross—
A. Please, Mr. Young, may I check this?
Yes, sir. I am sorry.
Q. And you say that if the fourth week's gross equals or exceeds thirteen five, the picture will be held for a sixth week; is that correct?
A. (No response.)
Q. And except for STRANGER you never grossed that much on a fourth week, did you, for any picture?
A. No, sir.
Q. Now, you testified that, on here on direct today, that BUS STOP, that on your offer taking the projected receipts at the Fox Theatre, you would have paid $3600 less.

Now, the next picture was called THE BEST THINGS IN LIEE ARE FREE that you testified about today, and that picture—Mr. Steinberg and Mr. Sawyer have to check—had a national film rental of $1,400,000. Now, your whole premise on all these comparisons are based upon the assumption, as I understand it, so far as Twentieth Century-Fox pictures that played in the Fox Theatre are concerned, is that the Viking

(3488)

will gross the same amount as the Fox Theatre; right?
A. Yes, sir.

Q. Good. Now, Mr. Wren, if you look at that same exhibit that you have there, 176, and bear with me for a minute, this picture right in the medium class, you might say, between a million and $2 million—

• • •

Q. Now, if you look on that you will find that you played thirteen pictures that grossed between one and $2 million—had a national film rental of between one and $2 million.

A. I will accept your figures.

Q. I will call them out to you and you go down the line. BETRAYED is the first one, ATHENA, GLASS

(3489)

SLIPPER, LUCY GALLANT, RED VELVET SWING, THE SECOND GREATEST SEX. What is that "GOODBYE"—ALWAYS GOODBYE? It is that Universal picture.

A. NEVER SAY GOODBYE.

Q. NEVER SAY GOODBYE, COMANCHE, RUN FOR THE SUN, BANDITO, ATTACK, THE LOST WAGON, and TEENAGE REBEL. Now, I didn't call of those grosses, but they are the ones you had.

Now, you take those thirteen pictures and take your first week's gross average out of them, your average gross on this type of picture, THE BEST THINGS IN LIFE ARE FREE, is $11,247. You accept that?

A. I will accept your figures subject to check.

Q. And there is not one picture in that except BETRAYED which had a national film rental of $1,992,000, and it played over Labor Day, in 1954, Loew's picture, which had a first week's gross at your theater of $17,000; is that not so?

A. I will accept your figures subject to check; yes, sir.

Q. Yes. All right. Now, the same—the next picture is one that played just partly during this period.

A. Which next one?

Q. Next period, BETWEEN HEAVEN AND HELL, which had a national film rental of $1.6 million, 600,000, or $1,600,000, and which also is between one million and two million. Now, except for this one picture, BETRAYED, which played over Labor Day, you

(3490)

had no picture that had a week's gross that exceeded the $15,285 gross at the Fox Theatre on the first week; is that not so?

A. Yes, but this exceeded it by 5000, sir.

Q. Sir?

A. I say this first week at the—

Q. And that had a much higher national film rental?

A. That is right.

Q. And it played over Labor Day?

A. Yes, sir.

Q. And THE BEST THINGS IN LIFE ARE FREE played on October 19 to November—let's see—November 8, I believe.

A. I thought we were speaking of HEAVEN AND HELL, sir.

Q. All right. I am giving it to you and then I am just giving you the next one, just so you will have both play dates; and HEAVEN AND HELL during the period involved here played November 9 to 16, the first week, and then four more days, as you noted, to November 20, 1956?

A. Yes, sir.

Q. Correct? And there was no holiday in there?

A. No, sir.

Q. Now, we have had a lot of testimony and there have been some mistakes made in the testimony, though, from time to time, where we say, "Would you like to withdraw a question?"

(3491)

and I wondered if you would like another opportunity to

mortify the flesh and withdraw your answer that the second highest gross at any theater in Philadelphia was THE COUNTRY GIRL, which you say grossed $243,000, as you characterized or perhaps as Mr. Sawyer, that great little 994-seat Midtown Theatre.

A. I recall the incident; yes, sir.

Q. Well, actually THE KING AND I grossed $246,000 at the Fox Theatre in eleven weeks, didn't it? You better check that.

Mr. Sawyer: That is right.

By Mr. Young:

Q. And we didn't have 500 people sitting out there in the steaming July, 1956, with tickets in their hands waiting to get into the theater, did we?

A. I don't know, sir.

• • •

Q. So the second highest gross was at the 2422-seat Fox Theatre?

(3492)

A. Yes, sir.

Q. THE KING AND I in the eleven weeks; right, sir?

A. I stand corrected, sir.

Q. Now, on these bids that you made, you made them in consultation with yourself and Mr. Siey; isn't that right?

A. Yes, sir.

Q. And nobody forced you to make a bid that you didn't want to make; isn't that right?

Mr. Sawyer: Objected to as repetitious, Your Honor. We have had that a dozen times, I am sure.

Mr. Young: Oh, then if you concede it, I will withdraw it, and that is all I have, Your Honor.

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(3493)

By Mr. Wolf:

Q. Of the Fox pictures that you bid on or made offers on, Stanley got only one, THE LEFT HAND OF GOD, and that is one to—

Mr. Sawyer: Objected to. This has been all developed.

The Court: Yes. Why isn't that repetition, Mr. Wolf?

Mr. Wolf: Well, I am just saying to him:

By Mr. Wolf:

Q. And that is the one picture on which you have complained that your bid would have produced more money than the Stanley bid would have; is that correct?

A. I further stated, Mr. Wolf, that mine was the one of three bids that was in at the proper time, which was 10:30 a.m.

Q. I am asking you whether you did not complain just a few minutes ago to the jury that your offer would have produced a larger film rental than ours did.

A. Yes, sir.

Q. Now, in connection with your bid and our bid, I think you will agree that our guarantee was higher than your guarantee; is that correct?

A. The one that arrived at 1:00 o'clock in the afternoon, I will concede that; yes, sir.

(3494)

Q. But you know that is not an answer to the question of whether our guarantee was higher than yours. I think the Court will inform you that you are intended to answer my question and not volunteer information—

The Court: That is correct.

By Mr. Wolf:

Q. —which I don't ask for.

A. Thank you.

The Court: That is right.

By Mr. Wolf:

Q. Our guarantee was higher than your guarantee; is that correct?

A. The guarantee in the records, yes, sir, is higher.

Q. And our offer was for—your offer was for four weeks' play time and we played five weeks; is that correct? You have before you your—

A. I don't have the number of weeks, Mr. Wolf, in front of me or the bid. May I have the bid?

Q. Well, you have the number of weeks before you, how many we played.

• • •

(3495)

Q. What do you think our bid was on your complaint?

A. I don't know what your bid was, but you played it four weeks and three days, not five weeks.

Q. Well, when you made your comparison you made it on the basis of the film rental that we played in the period of four weeks and three days; is that correct?

A. That is correct.

• • •

Q. And in making up your calculation of what you would have paid, how long did you consider that you would have played the

(3496)

picture?

A. The same length of time.

Q. Four weeks and three days?

A. Yes, sir.

Q. Now, what was your bid for the length of time you said you would play it?

A. I don't know. I would have to see the bid.

Q. Don't you have it?

Mr. Sawyer: Your Honor, I object to this. That is a minimum length of time. That doesn't preclude him from playing it longer. If he says it precludes him, I object to it, Your Honor, as being totally beside the point.

By Mr. Wolf:

Q. You mean to say that if you bid for four weeks you have a right to play it as much longer as you please?

A. I might have a holdover figure, sir. I would like to see the bid. I don't know.

Q. Well, you have attempted to tell us what your bid would have produced. I would think you would have your bid before you before you would be able to do that, wouldn't you?

A. I had it at the time we worked on these figures; yes, sir.

Q. Well, you had it when you worked this up and you know, then, that you did provide for more than four weeks.

Mr. Wolf: Now, I call for the bid.

(3497)

The Witness: Yes, sir.

By Mr. Wolf:

Q. Four weeks.

A. Yes, sir, with holdover figures, third week's gross equals or exceeds 10,000.

Q. Was it? Were there four weeks?

A. The third week was $10,537. The third week, the Mastbaum's third week, was $10,537.

Q. Did you hold it over then for the—well, you didn't have the picture, of course.

A. No, sir. I did not.

Q. And you did not hold it over; all right. Was that your final bid?

A. Yes, sir. That would be the bid we submitted.

Q. Now, in the computation that you have made and presented to the jury, you estimated what the advertising would be; is that correct?

A. Same advertising as the Mastbaum Theatre.

Q. But did you estimate it or did you know?

A. We used the same advertising from the cut-outs, sir.

Mr. Sawyer: No, no.

By Mr. Wolf:

Q. No; you didn't. You estimated it. Look at your own statement.

(3497a)

A. Oh, I am sorry. You are right. I am sorry. I see it here.

(3498)

Q. You estimated it?

A. $7,000, right, sir, estimated $7,000, distributor to pay it all.

Q. As a matter of fact, the actual advertising was $8,186?

Mr. Sawyer: Objected to, Your Honor. We have never had that figure. If we had it we would have put it in exactly.

By Mr. Wolf:

Q. Then what you are saying is that your estimate was only an estimate and you are not able to say that that is all that the advertising would have cost, so that your figure necessarily of what you would have paid is an estimated figure, isn't it?

A. We have indicated that, sir.

Q. Pardon me?

A. We said that, sir.

Q. It is an estimated figure?

A. Yes, sir.

Q. Now, how do you charge your advertising? Against which weeks of the play time of the film do you charge advertising?

A. I don't understand the question, Mr. Wolf.

Q. Well, if your bid is 90 per cent over a certain amount,

(3499)

plus advertising, do you divide the advertising that you deduct each week or at the end or at the beginning or when?

A. Well, depending on the campaign. If I lay out a pre-opening and first week campaign that is to be added to the house expense, that campaign will be added to the pre-opening of first week's house allowance or expense before computing film rental.

Q. Now, in estimating the amount that you would have paid for film rental if your bid had been accepted, will you show me just how you calculated the advertising, in which weeks you deducted it, because it makes a big difference, doesn't it?

A. I don't understand you, sir.

Q. Well, if you are bidding 90 per cent over—if your film rent is to be 90 per cent over a certain amount, it makes a big difference in which week—

A. Yes.

Q. —you deduct the advertising, doesn't it?

A. We take this on a cumulative.

Q. Well, do you have your computations?

A. Let me see the bid, please.

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(3500)

Q. Well, I thought you already had computed this and that you were just telling us what you had already put down.

A. Well, I have. Sometimes—

Q. If you are just beginning to compute it now, I don't know how you could have testified to it before.

Mr. Sawyer: Well, now—

Mr. Wolf: I will pick that up for you.

(3501)

The Witness: Thank you very much.

I am trying to do it in round figures using a 53-50 basis house allowance, multiplying it by 4-3/7 weeks.

By Mr. Wolf:

Q. And deducting it pro rata for each week?

A. Deducting it from the film, the bulk amount here, $56,100,—

Q. Yes.

A. —taking your 90 per cent of it.

Q. At the end?

A. Yes, sir; and then deducting the advertising from the film rental,—

Q. Yes. Now, under the—

A. —which it is in this instance.

Q. Now, under the bid which you make the distributor had to pay all the advertising; under the bid that we make the distributor had to pay only half; is that correct?

A. I assume from these figures; yes, sir.

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(3504)

Q. When I asked you on cross-examination whether the first written complaint that the Viking had made about Stanley Warner was when the suit was filed, you said you didn't know of any other but you weren't certain and that you

would have to check; you said your counsel might have sent a letter to Stanley Warner and that you would have to check on that. Now that you have had an opportunity to check, I assume that you found that there was no communication to Stanley Warner before the suit was filed; is that correct?

A. I believe it was only sent to distributors; yes, sir.

(3505)

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Q. Do you believe that it is better for a theatre to have more pictures of less quality than it is to have a picture of higher quality playing for the same length of time as a number of pictures of lower quality because of the fact that if you have more pictures you have more first weeks and more second weeks?

A. I believe we testified that we were out for quality

(3506)

pictures.

Q. I understand that. That isn't an answer to my question.

A. Now, may I continue, sir?

Q. No.

The Court: You answer the question and then you give whatever explanation you want.

By Mr. Wolf:

Q. I am asking you whether in your opinion if it is better for your house to have one picture that plays a long time than it is to have a number of pictures that play a shorter time, if they in the aggregate play the same length as the higher quality picture which I first mentioned?

A. Depending on the pictures that play the short run.

(3507)

A. Depending on the pictures that play the short runs.

Q. That, of course, is true, but you wouldn't state as a general proposition, would you, that it is better for you to

have a larger number of smaller pictures than it is to have one picture of higher quality playing the same length of time as the larger number of pictures of lower quality, would you?

A. I would prefer to have a quality picture and take if off when I deem it advisable.

Q. Yes, of course, it would be very nice if we could just do that, but ordinarily your contract does not permit you to do that, does it?

A. Not my contract, no, sir.

Q. Are you then willing to say that you do not regard it as an advantage to your theater to have a larger number of lower quality pictures which play the same length of time as one picture of higher quality plays?

A. Depending on the length of run of the quality picture.

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(3509)

Q. Now I will try to put it so that it is a little easier for you to answer.

Assuming that you have two pictures that have a national film rental of, say $5 million.

A. Yes, sir.

Q. And assuming that you have seven pictures that have an aggregate national film rental of $5 million, and assuming that you play them both—

A. Pardon me. Seven?

Q. Seven with an aggregate of $5 million.

A. And two of $5 million?

Q. Two of $5 million and seven worth $5 million.

A. Yes.

Q. Assuming that you play the two for the same length of time that you play the seven, which do you regard as more advantageous to your theater?

A. Is BLACK TUESDAY in the seven, sir?

Q. I haven't attempted to say.

A. No, it is an intangible, sir.

Q. Can you answer it or can't you? Do you have no opinion on that point?

A. No, sir, you have to know the caliber of the other

(3510)

pictures, the quality of the other pictures.

Q. In other words, you say you can't answer that, you can't answer that question?

A. I can answer—

Q. You have no opinion?

A. I have an opinion. If I knew the quality of the two pictures that you say are $5 million, if I knew the type of picture, and by that I mean that a BLACK TUESDAY might do very well in Philadelphia and not do well elsewhere, and by the same token there are pictures that might do well elsewhere and not do well in Philadelphia.

Q. What you are really saying is that the national film rental does not furnish you with sufficient information as to the quality of the picture to be able to answer my question?

A. No, sir, I did not say that.

Q. I thought you did.

A. Assuming that the two pictures that total $5 million are of the caliber of the BETRAYED or of THE LAST TIME I SAW PARIS, we naturally would elect to play those in preference to seven five-million dollar pictures, depending on the quality of the seven pictures that grossed $5 million.

Q. I understand that, but I thought that you said that the quality of those pictures was determined by the amount of their national film rental. Now, are you going back on that?

(3511)

A. No, sir, I do say it.

Q. Well, then, you know what the quality is, because I am assuming that the quality is such as would be the quality

of pictures playing that have a national film rental of $5 million.

A. In this case in that instance I will take the two of the $5 million.

Q. You will take the two?

A. Yes.

Q. In other words, it is not an advantage to any house to have to play a larger number of poor pictures in preference to a smaller number of better pictures in your opinion?

Mr. Sawyer: Well, you have 10 million on one side and 5 million on the other.

Mr. Nizer: No. It said two aggregating five and seven aggregating five.

Mr. Sawyer: I am sorry.

By Mr. Wolf:

Q. Are you able to answer the question?

A. I believe I did, sir.

Q. Well, will you do it again.

A. I would prefer to take the two pictures, with an aggregate national film rental of $5 million, in place of seven pictures with an aggregate national film rental of $5 million.

Q. That is right, and therefore I am saying it is your view

(3512)

that a theater which has to play a large number of pictures of lower quality will do much worse, will do worse, than a theater which is able to get less good quality pictures and play them for a longer period of time?

A. Mr. Wolf, if we could get pictures of this caliber you are speaking of, $2,500,000 each, yes, sir, we would like to have those.

Q. That is right, and so would we, wouldn't we, any theater would?

A. I can't speak for you, sir, I am speaking for the Viking.

Q. Do you think that we would have any different ideas in this respect than you have?

A. I don't know.

Q. Don't you think we would want the same thing?

A. I don't know, sir.

Q. You don't know that?

A. No, sir, I do not. I would not know what Stanley Warner wants.

Q. Would you think we would want the worst picture to show our audiences? You know, don't you, that we would want the highest quality of pictures that we could get, just as you would want?

A. I would assume yes.

Q. Yes. And therefore if we have to play many more pictures

(3513)

than you have to play, in order to fill the same length of playing time, it would be your judgment that we would be doing more poorly than you would playing a smaller number of pictures in the same time?

A. No, I wouldn't say that as a result of playing more of these you were doing poorer.

Q. I thought that you just said that if you had to play more pictures of poorer quality your result is worse than if you play few pictures of high quality.

A. I would say so, yes.

Q. That is right. Therefore, if we have to do that we are worse off than if we don't have to do it.

A. I would say so, yes, sir.

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(3514)

By Mr. Rome:

Q. Mr. Wren, there has been comment by you from time to time concerning moneys reimbursed by the distributor to the exhibitor in connection with advertising.

A. Yes, sir.

Q. Do you recall your reference to that upon occasion?

A. Yes, sir.

Q. Actually the fact is that that is not a gratuity from the distributor to the exhibitor, is it?

A. No, sir, that is usually his share.

Q. It is the share of advertising expenditure which is being paid by the distributor, isn't that so?

A. Yes, sir.

Q. And it is based on the fact that the exhibitor has actually

(3515)

incurred the expense incident to the advertising in the total amount, isn't that so?

* * *

Q. In other words, the practice is actually that the exhibitor goes ahead and places the advertising, incurring the expense and paying the bills in the first instance?

A. Right, sir.

Q. The advertising being paid in accordance with an agreed-upon plan between the exhibitor and the distributor?

A. Yes, sir.

Q. And then after the bills have been paid by the exhibitor he informs the distributor of the amount of money that has been paid, and then the distributor pays his share?

A. Yes, sir.

Q. Now, just one other thought with regard to a matter touched upon by Mr. Wolf, and I shall not duplicate the area to the best of my ability, sir. In connection with

the problem of a theater playing a picture for one week or for a

(3516)

short period of time, actually you have already testified, not only under Mr. Wolf's questioning, but earlier, when you and I have discussed the matter together, that it is your wish to play a picture for a longer period of time; isn't that so?

A. A quality picture, yes, sir.

Q. And actually when you have submitted your bids to the distributors for various pictures it has been you who have stipulated the number of weeks of playing time that you would give a particular picture; isn't that so?

A. By and large, yes.

Q. Well, you say "by and large." Has there ever been an instance in which you have put a number of weeks in your proposal to a distributor that has not been your own voluntary decision?

A. No, but on a rebid or something you might either go up or down. That is what I mean.

Q. Yes, but again, when you go up or down, it is your decision?

A. Oh, yes, definitely.

Q. And the fact that, as for example, with the film STUDENT PRINCE—well, I will use one that came within your own period of time. When you stipulated in your own proposal concerning MAN IN THE GRAY FLANNEL SUIT a minimum of ten weeks

(3517)

that was because you knew or expected that the film would do a good job in your theater and would last not less than ten weeks, isn't that so?

A. That is right, sir.

Q. And in submitting that proposal you also took into account that the gross receipts of your theater over the

period of ten weeks would gradually diminish; isn't that so?

A. Surely.

Q. But even though the gross receipts were on a diminishing scale, you nevertheless voluntarily made the proposal of ten weeks?

A. That is right.

Q. And hence when a theater is in a position of playing a picture only for one week, by and large, as you have earlier agreed with me, it is the fact, that is because the exhibitor does not expect this picture to hold up longer than one week; isn't that so?

A. Did he bid or negotiate?

(3518)

Q. Either way.

A. On a negotiated deal depending on how the market was I might be able to buy STRANGER on a negotiated deal for an indefinite run.

Q. And now you use the term bid or negotiate. Is there a difference between the two in your mind?

A. Negotiated is not in writing, submitted by the exhibitor as we understand it.

Q. And you do recognize a difference between bid or negotiate?

A. I think the discussion you are referring to was bid or offer, sir.

Q. I am asking you.

Mr. Sawyer: Yes.

By Mr. Rome:

Q. I am asking you whether you recognize a difference between bid or negotiate.

A. Yes, sir.

Q. And the difference is that a negotiation, as you view the term, is merely a verbal exchange between the distributor and the exhibitor, is that correct?

A. Yes, sir.

Q. And are you asking the Court and jury to accept the fact that when you use the term bid you are always

(3519)

referring to something in writing?

A. Yes, sir.

Q. You never submitted oral bids?

A. No, sir.

Q. You are quite sure of that?

A. We were told later they were oral bids, sir. We thought we were negotiating.

Q. I am asking you, Mr. Wren, whether you have ever submitted an oral bid.

A. We may have, sir. I can't recall which picture, though.

Q. You say now that you may have—

Mr. Sawyer: What do you mean, you say now?

By Mr. Rome:

Q. I am asking.

A. We may have.

Q. You may have?

A. Yes, sir.

Q. And, hence, you recognized, even within your own practice, that there may be such a thing as an oral bid? I am not suggesting that there is anything wrong about it, Mr. Wren. I am just asking you whether you have ever done it.

(3520)

A. I can't recall ever having done it, Mr. Rome. We may have, but I can't recall ever having done it.

Q. Do you recall under the questioning by Mr. Sawyer regarding the film, AMBASSADOR'S DAUGHTER, at Page 1145, that Mr. Sawyer asked you, "Was that bid submitted in writing or orally, do you recall, Mr. Wren?

"A. I think it was orally."

A. Then maybe that is the picture, sir.

Q. And you don't find anything wrong about the practice of submitting a bid orally, do you?

A. Yes, sir. I think if we are to reduce it to writing, if it is requested that the bid be submitted in writing, I think everyone should submit an offer in writing.

Q. But you didn't do it in this case, then?

A. I would have to check the bid to see if I did. If I say we did maybe I had a call on the phone saying we want to release this picture. Would you give us an offer and follow it. I think we did.

Q. Are you saying that your testimony at Page 1145 is incorrect?

A. No, sir. I am not. I am not saying that—

Q. I don't mean to interrupt.

A. I am saying that may have been the situation. I

(3521)

may have gotten a call from the branch manager saying I want an offer on the phone covering it with a letter.

Q. You say you may have. I ask that be stricken, sir. I am interested in what actually happened, not your surmise or guess on this date in 1961 as to something that happened years ago. I am sure you recognize that.

A. Yes, sir. I do understand that.

Q. And am I to understand that you feel that if you did submit a bid orally that that would be an improper practice?

A. Depending on the treatment afforded to others, yes, sir. If you were obliged to put it in writing I should be obliged to put it in writing.

Q. You are then reducing this whole problem to the point that tit for tat kind of thing?

Mr. Sawyer: Objected to.

By Mr. Rome:

Q. If you have to write a letter I have to write a letter.

A. No. I want to explain it this way. There is too

much room for error in oral offers. Entirely too much room for error. The written word holds you to what your promise is.

Q. That is an interesting observation, and I thank you

(3522)

for it, Mr. Wren, but are you then suggesting that the room for error is on the part of the exhibitor or on the part of the distributor?

A. It could be on the part of both, sir.

Q. And on whose part was the error when you submitted your oral bid for AMBASSADOR'S DAUGHTER? Was that on your part?

Mr. Sawyer: He didn't get it.

A. I didn't get the picture, sir.

By Mr. Rome:

Q. Ah, the difference is then that you consider it improper only if you get the picture?

A. No, sir.

Q. And it is not improper if you don't get the picture?

A. May I illustrate?

Q. You answer my question first, please.

A. No, sir. I do not say that.

Q. And, therefore, you differ with Mr. Sawyer's comment he interjected the fact that you didn't get the picture. That fact has nothing to do with what you and I are talking about?

A. I am talking about oral bids, sir.

Q. I am too, but my question to you is that Mr. Sawyer's interjection that you didn't get the picture,

(3523)

AMBASSADOR'S DAUGHTER, has nothing to do with whether your actual submission of a bid orally was right or wrong, has it?

A. No. What I would like to explain on an oral bid is that at the end of any conversation two or three days later I may be told to confirm what I said, or I may be asked to sign a contract saying that I said thus and so incorporating the things I supposedly said. They might be entirely different than the oral offer.

Q. That might be. Again you used the word, might, and I recognize this is your reasoning for being reluctant to engage in the practice of submitting a bid orally.

A. Yes, sir.

Q. Is that so?

A. Yes.

Q. But in fact you have done it?

A. You have indicated one point where we evidently did.

Q. To the extent that you did do it do you consider it an improper practice on your part?

A. Yes, sir.

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(3524)

Q. You recognize then, as you have testified, that there may be oral negotiations for films between exhibitors and distributors and similarly that even on bidding there may be written bids or oral bids?

A. I told you I was opposed to oral bidding, sir.

Q. Whether you are opposed to it or not, you recognize there may be such a thing?

A. If it is the only way we can secure a picture, if I am told that is the only way we can secure a picture, is to make an oral bid, I would naturally have to make an oral bid.

Q. Do you recall testifying, still with regard to the AMBASSADOR'S DAUGHTER, that your grievance concerning the picture was that the Goldman Theatres negotiated for the picture?

A. Yes, sir.

Q. And presumably that means that there were merely oral exchanges between William Goldman Theatres, Incorporated, and United Artists for the pictures, is that so?

(3525)

A. Yes, sir.

Q. And that is what you find objectionable?

A. Yes, sir.

Q. About that picture?

A. Yes, sir.

Q. And yet you, yourself, submitted an oral bid on the picture?

A. May I see the bid, please?

(The bid was handed to the witness.)

A. Yes, sir, Mr. Rome. This rejection offer, or rejection notice, has the words "offer" in it. That is the elusive word.

Mr. Nizer: What word?

A. It is an elusive word. It is in and out. No one can pin it down. Once it is a bid and the next time it is an offer.

By Mr. Rome:

Q. But there is nothing that Mr. Steinberg has shown you that changes your testimony that you submitted an oral bid, or offer, on AMBASSADOR'S DAUGHTER, isn't that so?

A. Yes, sir, but I would like to develop the answer further, if I may.

Q. Express it, if you wish.

A. "This is to advise you that your last offer on

(3526)

AMBASSADOR'S DAUGHTER as follows: 50 per cent first week. Indefinite run. 25-50 per cent balance. One week guarantee has been rejected by the producer and the picture has been awarded by the producer to your competitor, Randolph Theater." This indicates to me that the Randolph Theatre made an offer.

Q. Do you object to that?

A. My offers are never adjusted, sir.

Q. Are you now saying that your grievance is with regard to an adjustment given by United Artists to the Randolph Theatre on the picture?

A. If it was an offer and it was adjusted I would like it clarified, sir. I would like to know if bids are adjusted. If offers are adjusted. If negotiated bids are adjusted, or competitive negotiations are adjustable items. I would like it explained.

Q. Perhaps sometime we can have lunch together and talk about these things.

A. Thank you.

Q. But in so far as we are here consuming the time of the Court and jury I am sure you recognize we must limit ourselves to the issues in this case. I would inquire whether you are now suggesting that you have some new and different and heretofore undisclosed grievance

(3527)

regarding the film, THE AMBASSADOR'S DAUGHTER?

A. No, sir. I just asked a question, and it was improper. I am sorry.

Q. In light of what has now been developed would it be not accurate and fair to say that you have no real grievance concerning the film THE AMBASSADOR'S DAUGHTER?

A. Yes. I think we should have been awarded the picture.

Q. You should have been awarded the picture?

A. On the offer submitted.

Q. You consider your offer to have been a better offer?

A. Yes, sir.

Q. And your grievance as earlier stated in your testimony that the film was negotiated between United Artists and Goldman is no longer a basis of complaint on your part?

A. Yes, sir, because it doesn't indicate negotiated here, sir.

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(3528)

Q. Do you recall actually, Mr. Wren, informing United Artists that you did not wish to submit an offer for AMBASSADOR'S DAUGHTER?

A. I may have, sir. I don't recall it, no. But I may have.

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(3530)

Q. Mr. Wren, I hand you a document which has been marked Defendants' (Goldman) Exhibit No. 77. I will ask you to read it, please, just to yourself first.

A. Yes, sir.

Q. That actually is a copy of your telegram to United Artists concerning the film AMBASSADOR'S DAUGHTER, is it not?

(3531)

A. Yes, sir.

Q. And it informs United Artists that you are not going to submit an offer on the picture AMBASSADOR'S DAUGHTER?

A. Yes, sir.

Q. Now, having seen that telegram, does it not refresh your recollection so that you now recall the fact that United Artists solicited competitive bids from you and other exhibitors for the film AMBASSADOR'S DAUGHTER?

A. Yes, sir.

Q. That telegram from you to Mr. Tunick of United Artists makes specific reference to such a solicitation of a competitive bid, does it not?

A. Yes, sir.

Q. And you are informing Mr. Tunick by that telegram that you are not intending to submit an offer for the picture. Is that right?

A. Yes, sir.

Q. And would it be accurate and correct for us to draw the conclusion that when you used the word "offer" there you were intending to use it in terms of bid. Is that right?

A. Yes, sir; competitive bid application.

Mr. Rome: I offer this document in evidence, sir.

The Court: Very well.

(3532)

By Mr. Rome:

Q. Now, actually, does this telegram not also further refresh your recollection so that you now recall the fact that after you had informed Mr. Tunick that you were not going to submit an offer or a bid, but thereafter you did have discussions orally with Mr. Tunick?

A. Yes, sir.

Q. And in the course of those discussions you submitted to him an offer or a proposal whereby the Viking Theatre wished to license the film AMBASSADOR'S DAUGHTER?

A. Yes, sir.

Q. And that was communicated to Mr. Tunick orally. Is that right?

A. Yes, sir.

Q. So that this is at least one situation then in which the Viking Theatre submitted an oral bid in response to an invitation from a distributor, in this case United Artists, for a competitive bid. Is that right?

A. Yes, orally with us as a bid, yes.

Q. And in light of our discussion this morning would you say that that was something improper on your part?

A. No, sir.

Q. There was nothing at all improper, then, as you view it in the fact that although United Artists had solicited

(3533)

competitive bids you replied with a verbal offer.

A. Yes, sir.

Q. Would you say that this was the only instance in which you did that with any distributor during the period in suit?

A. No, sir.

Q. You have a recollection of having done it in other cases as well?

A. We have read telegrams here, sir, where we said we would be pleased to negotiate. I think SEVEN CITIES OF GOLD—well, any number of pictures where we talked about we didn't wish to submit a competitive bid or complete a competitive bid application but we would negotiate.

Q. Well, I hand you D-77. There is nothing contained in that telegram which says to Mr. Tunick, is there, that you wish to negotiate with him?

A. No, sir; there is not.

I say, we have read others here, not concerning this one.

Q. But specifically, is your testimony now the fact that you recall other instances in which you submitted oral bids?

A. Yes, sir.

Q. What other pictures have you in mind?

A. BANDIDO. Then there was the Robert Wagner picture. I am trying to think of the name of it.

(3534)

Q. Perhaps it will come to you in a moment.

A. Surely. There are a number of those, sir.

Q. Sir?

A. There are a number of those, five, six, seven of those.

Q. Five, six, seven instances in which the Viking submitted an oral bid in response to a request from the distributor for competitive bidding?

A. I believe there was a subsequent, too, announcements saying we were not going to submit a bid for them.

Q. Well, whether subsequent to a statement by you that you were not going to submit a proposal or not, there are six or seven such instances?

A. That is right, sir.

Q. And you find nothing wrong in that practice?

A. No, sir; if it is not considered a bid. If it is considered a bid with everybody as it invariably is with us.

Q. Well, have you finished?

A. Yes, sir.

Q. Would I then be correct in understanding your testimony this morning to be to the effect that it was improper for an exhibitor to submit an oral bid when there was competitive bidding?

A. By that I meant, Mr. Rome, perhaps I did not make myself clear. If you are permitted to orally bid as opposed to my

(3535)

having to submit bids in writing. Now, if after bids in writing have been rejected or we have expressed a desire to what we term negotiate, not complete a form or not send in a written offer, if at that particular moment everybody is negotiating. But what our experience has been once we submit this oral offer or a negotiation, whatever we proceed to do, at the conclusion of the engagement if we are awarded the picture we are then told we were competitively negotiating and it is not subject to adjustment. We were told it was an oral bid.

Q. Well, am I to take it then that these seven instances, approximately, that you are now talking about were instance in which the distributor rejected all bids and then proceeded to negotiate?

A. No, I did not mean that.

Q. You are not talking about that situation?

A. No, sir. I am speaking of where we felt we were competitively negotiating—I mean, negotiating—and were told after the picture had been awarded to us the reason they could not adjust the matter is because they had been negotiating with other people and, therefore, it fell in the competitive negotiating or bid category.

Q. Which you felt was a disadvantage to you because under those circumstances you could not apply successfully for an

(3536)

adjustment. Is that correct?

A. That is right, sir.

* * *

(3540)

Q. You regarded the film SOLID GOLD CADILLAC as an important film for your theatre?

A. Yes, sir.

Q. And isn't it the fact that you submitted an oral bid or offer for that picture?

A. Yes, sir. I was told to come to Columbia's offer—office for that.

Q. And hence you submitted your bid on it orally?

A. A portion of it.

Q. A portion of it?

A. Yes, sir. I was told that I would have to put up a cash guarantee, which I told them I wanted to discuss with my superior, Mr. Sley, and I was told to return to the office and do that, and about a couple hours later they called me and told me if I hadn't discussed the matter with Mr. Sley as yet, forget about it, because the home office had awarded the picture to the Mastbaum Theatre.

Q. Yes; but I believe you have already told us that. My only point is still with regard to the fact that in connection with that film, which you regarded as important, you

(3541)

submitted an oral offer for it?

A. Yes, sir.

Q. And hence the fact that some other exhibitor similarly submitted an oral offer for it would be in no way improper; isn't that your position?

A. Yes, sir. That is the only way it can be done. That is the way we have done it.

Q. Now, going back to AMBASSADOR'S DAUGHTER, did you take steps to inform yourself whether or not all other exhibitors interested in the film were being afforded the opportunity to submit an oral bid or offer?

A. No, sir. When he phoned me and asked me for an offer, I gave him one.

Q. And hence, I take it, it would follow from that that you would recognize that there would be nothing improper if similar treatment was accorded to other exhibitors by distributors in connection with other films; right?

A. Depending on whether all exhibitors had had to conform in the same manner. If I was told that mine had to be in writing and yours could be oral, that we object to.

Q. And—

A. We want uniform rules.

Q. And you would agree, would you not, that an exhibitor would not have any obligation on his own part to go out and

(3542)

inform himself whether all other exhibitors are being similarly informed; right?

A. No. It would be on the distributor.

Q. And just as in the case of AMBASSADOR'S DAUGHTER, you responded to the conversation with Mr. Tunick, if some other exhibitor under different circumstances were to engage, be engaged in conversation by a distributor about a particular picture and made an oral

offer, you wouldn't have any complaint about that, would you?

A. No, sir.

Q. Right.

A. That was the way they did it.

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(3546)

Q. You do recall, do you not, Mr. Wren, that you submitted an oral bid to RKO on the film DEATH OF A SCOUNDREL?

A. Yes, sir.

Q. And there was nothing wrong in your judgment about that?

A. No, sir.

Q. This despite the fact that there was competitive bidding?

(3547)

A. Yes, sir.

Q. And hence if another exhibitor discusses something orally with a distributor, you would not consider that in any way improper?

A. No, sir,—

• • •

Q. Had you finished your answer, Mr. Wren?

A. I said, if he was bidding.

Q. Sir?

A. If he was bidding.

Q. If he was bidding and submitted his bid verbally or orally, that is agreeable with you and you don't find anything wrong about it?

A. If oral offers are binding, they can be called bid, competitive negotiations, anything else, and the rules apply to one and all. We don't care what term they use. They can call it oral; they can call it verbal; they can call it competitive bidding, competitive negotiations, anything else,

(3548)

but if they must be binding on all parties participating, if oral with one person means, "Oh, he was negotiating and, therefore, it is subject to adjustment," we want to enjoy the same climate, the same privileges. With us, oral offers are bids not subject to adjustment.

Q. Have you finished, Mr. Wren?

A. Yes, sir.

* * *

(3588)

By Mr. Nizer:

Q. Mr. Wren, you and your counsel put a good many figures and pictures on that blackboard in a series of comparisons of pictures which played at other theatres and which you computed what you would have done had you played them at your theater.

A. Yes, sir.

Q. And the general purpose of that whole demonstration of all these figures was to reach the conclusion on your part that when the distributor originally awarded the picture to someone else than the Viking that he should have awarded it to you at that time. Isn't that your objective in all of these figures? That was what it was all for, right?

A. Generally, yes, sir.

Q. And you of course recognize that at the time that the distributor made his award he couldn't have had any of the figures that you put on that blackboard, could he?

A. No, sir.

Q. The distributor when it was making the award had to work with the material which was before him, which were the various bids, not only yours and Stanley Warner or Goldman, but the Arcadia, the Trans-Lux, whoever bid, as we will see in a

(3589)

moment. And he didn't have the benefit of knowing how

this particular showing would come out over a period of ten weeks with all these figures for each week, did he? He could not tell that in advance, could he?

A. No, sir.

Q. And what you have done, so that we address ourselves to the same subject matter, what you have done is having the benefit of what we have called hindsight, which means the picture played very many months later, or whenever it was, years ago from the time that you are making all these computations, you were reaching backward to say, "That distributor exercised a bad judgment in the light of what I am going to try to show on this blackboard." That was the objective, right?

A. As to what we know now, yes, sir.

Q. Now, in making that kind of series of computations, you haven't played the picture. This was a picture in each instance which was awarded to someone else, right?

A. Yes, sir.

Q. And when the picture plays at another theater, whatever that theater be, it cannot play at any of the other ten or eleven competing first-run theaters, it is exclusive for whoever gets it first run, right?

A. Oh, yes, sir.

(3590)

Q. Therefore, when you were making your kind of demonstration on that blackboard you didn't reach into your own prior experience in your own theater on pictures that might have the same national film rental, let's say. You never did that, did you? You didn't go back to your own theater to see how you had done on what you would call a similar picture? You never did that, did you?

A. Do you mean a picture that was playing perhaps at the same time as one of the pictures we were—

Q. No, no, Mr. Wren. I am being broader than that. Even if it played any other time, but at your own theater. You never compared what your Viking Theatre could have

done on a similar picture? You never did that, did you, in any of the demonstrations here?

A. No, not on the board here, no, sir.

Q. Never?

A. No, sir.

Q So what you did in all of these demonstrations was to shall I say ignore--I don't mean to make it invidious—but you ignored your own prior experience at the Viking Theatre and what you did in every one of those instances was to assume that whatever that other theater that played the picture did you would have done exactly the same box office

(3591)

receipts. That is what you did, right?

A. With a couple of exceptions, one of them being GUYS AND DOLLS.

Q. Well, we will come to GUYS AND DOLLS, and I don't concede it to be an exception but for the moment, so we may progress—

A. No, I mean as regards playing time, sir.

Q. As regard what?

A. Playing time, as to the number of weeks the Randolph played it as opposed to the number of weeks the Viking would have been obliged to play it.

Q. I will come to playing time separately. My present question, Mr. Wren, is do we not agree on this, that in every one of the demonstrations that you gave on the blackboard, without a single exception, you didn't use the prior experience of the Viking Theatre to determine what the Viking Theatre might have done on a similar picture but you always in every instance assumed that the box office receipts at the other theatre that did get the picture would have been attained by the Viking Theatre in every instance right to the penny?

A. Yes, sir.

Q. And in every single one of these demonstrations you made that assumption, even though the theater which

played it was the Mastbaum (indicating) of this size, 4000-odd seats?

(3592)

A. Yes, sir.

Q. Even though the theater that played it was the Stanley (indicating) with almost 3000 seats; even though it was the Fox, with 2400 seats, and so on.

Here is the Viking down here with a thousand seats. You assumed in every case that you would have grossed at your box office right to the penny exactly what any of these other theaters made on that particular picture. That is what you did on every one of those computations?

A. Yes, sir.

Q. And of course if the jury and his Honor should think that that is not a fair way to calculate it, namely, to assume in every case that the Viking would have made right to the penny the exact same amount and box office that any of these larger theaters made, if they should not agree with you, then you will concede, will you not, that all of these computations can be discarded, they would all be wrong if that assumption fell, right?

A. No. I think we indicated instances of where we might not be able to hit the first week's gross or the second week's gross. I think we were fair in that respect.

Q. I didn't ask you about that and I didn't even say you weren't fair about it.

My question is if that assumption which underlies

(3593)

every one of the illustrations on that board that you did over a whole day, whatever it was, that assumption, namely, that every dollar that was received at the box office of the other larger theater that played this picture would be exactly the same amount of dollars to the penny that you would receive at the Viking—that is what you did in these demonstrations, right?

A. Yes, sir.

Q. Now, if that assumption—I just ask you this as a conditional question—if that assumption is wrong, if the jury should disbelieve it or not think it is reasonable, then you will concede, will you not, that all of these demonstrations are false?

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Q. You will agree with that, won't you?

A. Subject to the proof. I would like to see it, yes, sir.

Q. Now, it is not subject to anything. It is the proof you

(3594)

offered. You don't want to make it subject to your own demonstration?

A. No, sir. You say you were going to—

Q. Listen to me again. I want you to understand the question.

You have told me that in every instance you assumed that the Viking would have exactly the same gross—

A. Yes, sir.

Q. —as any of these other theaters. We have passed that now.

A. Right, sir.

Q. That is the assumption you made.

A. Right, sir.

Q. Now I ask you this: Can we not agree thus far that if that assumption is incorrect or is disbelieved as an unreasonable one, you will agree that all your demonstrations depend on that assumption, don't they? All these figures depended on that assumption?

A. Yes, sir.

Q. And if that assumption falls, if anyone should think it is unreasonable, then you will agree that all of these demonstrations are false and fall? We will agree on that, if anybody—

A. Yes.

(3595)

Q. Isn't that so?

A. Yes.

Q. All right. We agree on that.

Now I take you to Columbia pictures that you put on that board and I take you to the picture CAINE MUTINY—

A. Yes, sir.

Q. —which you testified about. That was a picture, just so we focus our mind upon it, in which the Randolph won the picture and played it, right?

A. Let me get the record, please.

Q. Do you want to find your sheet first?

Would you like to borrow mine?

A. I would, please. I can't find it.

Q. Will that help you?

Mr. Sawyer: We have one.

The Witness: Do you have an extra one, Mr. Sawyer?

Mr. Sawyer: (Handing documents to witness) Do you have any of the Columbias there? They are the three Columbias.

The Witness: Thanks.

By Mr. Nizer:

Q. Now, in that case, as you testified, the Randolph Theatre—

(3596)

(Mr. Nizer writes on blackboard.)

This is CAINE MUTINY, right?

A. Yes, sir.

Q. That is the picture we are talking about.

The Randolph Theatre is twice the size of the Viking, right?

A. Approximately, yes. 2020 seats against 1017 seats.

Q. All right. Twice the size. And you put on this board the fact that the Randolph in playing this engagement in nine weeks took into the box office—I will leave out the thousands and we will make it even—$237,000, is that right?

A. Yes, sir.

Q. And the Randolph Theatre paid a film rental on these box office receipts under the terms of its deal—

A. Yes, sir.

Q. The Randolph paid film rental—to Columbia Pictures, right?

A. Yes, sir.

Q. —of $145,900 something, but again I will make it even for easy calculation.

A. Yes, sir.

Q. Is that all right, sir?

A. Yes, sir.

Q. And in this case as well as in all others, in making the

(3597)

rest of your computation you assumed that the Viking, which is one-half the size of the Randolph, would have grossed exactly the same amount, $237,604.18, to be exact? You assumed that in the making of your calculation. That is what you did in this case as in all others. You took the Randolph box office receipts and said, "That is what the Viking will do."

A. In fourteen weeks.

Q. I am coming to that. First you—

A. Yes, sir.

Q. All right. Now, you knew, of course, that the Randolph—withdrawn.

You knew, of course, that the Viking could not in the nine weeks that the Randolph played possibly take in $237,000, didn't you?

A. Yes, sir.

Q. Therefore, what you did in that case is to say, "I am still going to assume that the Viking would have earned exactly the same as the Randolph at the box office, which is twice the size, but I will assume also that I would play it fourteen weeks instead of nine weeks in order to reach that figure."

You made that assumption on top of the other one, didn't you?

(3597a)

A. Yes, sir.

Q. And of course that assumption of five weeks more is simply an estimate and a guess on your part, it isn't in any contract or any other kind of scale you have here? This was simply your opinion, your guess, your feeling about it, right?

A. Yes, sir.

(3598)

Q. Now, you say, then, that it would have taken you—and you just made that assumption; you just picked it out of your judgment, let us say, your guess—it would have taken you fourteen weeks to do what the Randolph did in nine weeks?

A. Yes, sir.

Q. That is what you did there; that is another assumption that you have piled onto that, and that is a difference of five weeks more playing time; right?

A. Yes, sir.

Q. And that is about 45 per cent more playing time; is that right?

A. Yes, sir.

Q. So that you assume that you would have had to play 45 per cent more playing time than the Randolph in order to reach your first assumption that you would have done as well as the Randolph; correct?

A. Yes, sir.

Q. And, of course, in that assumption is another assumption that if you play five weeks longer you would have had a continuity of patronage that would fill your theatre in order to make up that huge quarter-of-a-million-dollar gross; that is another assumption, that you would have filled your theatre during that period; right?

A. Yes, sir.

(3599)

Q. And, of course, you never played that picture; that, too, was an estimate and a guess; correct?

A. Yes, sir.

Q. Your judgment?

A. Yes, sir.

Q. Now, of course, if you played a lot of quality pictures, and it takes you on good pictures—they don't have to all be as good as CAINE MUTINY; that was an exceptionally good one, wasn't it ?—but if you played a lot of quality pictures, then you say that what the Randolph Theatre would gross in a whole year would take you roughly 40 or 45 per cent more playing time to equal, even assuming that you would get all the business; is that right?

A. If they were all comparable to CAINE MUTINY; yes, sir.

Q. Or, even if they are not; if they are good pictures they don't have to be a quarter of a million dollars. Suppose it was $200,000 or 180. It would take you more time to equal that figure, wouldn't it?

A. Well, we did it in ten weeks—twelve weeks of STRANGER, 166, so would that be in proportion?

Q. That is your top—

A. It would be in proportion.

Q. That is your top, 166, not 237?

A. No, sir.

(3600)

Q. And that is the only picture in all the history of this period of the lawsuit that you did that, isn't it?

A. It was the only decent one; yes, sir.

Q. Well, you had other blockbusters, but they didn't do as well. There are—that is true of all exhibitors. You only play the pictures you get. You hope they will be wonderful. Isn't that true generally in the industry?

A. Yes, sir, when you go after a big one.

Q. In other words, I don't mean to argue with you, but every distributor hopes he has a wonderful picture and he tries to sell it as such, and every exhibitor hopes it will be great. We are all disappointed, aren't we? There are very few top pictures, aren't there, in the industry, really blockbusters?

A. Oh, yes. You mean CAINE MUTINY?

Q. Oh, I say very few. You can count them, as you once said, I think, on two fingers of our hand; there may be a few?

A. No. I didn't say that, Mr. Nizer.

Q. No—I say I say it.

A. Oh, I am sorry.

Q. Well, let us get back. On this kind of an assumption that you would have had to play five more weeks or 45 per cent more playing time, then, if you played a lot of good

(3601)

pictures, a lot of quality pictures, you would have had to play a year and four months or a year and five months, a years and three months—nobody could be exact on the way you are assuming this—in order to equal the gross box-office receipts at the Randolph? In other words, you would need more playing time to equal, isn't that so, mathematically?

A. Yes.

(To Mr. Ward) Is that correct? Is it 55?

Mr. Ward: 55.

By Mr. Nizer:

Q. No—I am a bad mathematician and I may have misled you, because I think you are a good one. I am told it is 55 per cent and not 45. Will you take that correction?

A. We will have to. We are outnumbered.

Q. All right—55. In other words, you had to use 55 per cent more playing time. I said 45.

A. I agreed with it.

Q. And you agreed with me and we were both wrong?

A. Yes, sir.

Q. All right.

Now, on CAINE MUTINY, let us take a look at a few figures there when you make all these assumptions. I haven't done this since I was eight years old, which is ten years ago.

(3602)

A. That is a rough one.

Q. $70,000 was the first week box office at the Randolph, which is twice your size, as you know. The first week on CAINE MUTINY they took in $70,000, using round figures.

A. Yes, sir.

Q. Now, you have constantly told us about NOT AS A STRANGER as being your top and outstanding success. We get that all the time, so let us do it again. Your top week in the history of the entire period of this lawsuit at the Viking Theatre was 34,000.

A. Yes, sir.

Q. So that the Randolph Theatre, with twice your size, was able to take in more than twice in one week at the box office as you took in at any time in the history of your theatre; that is right, isn't it?

A. Yes, sir.

Q. And also the Randolph Theatre paid a film rental on the first week—see, this is box office, Mr. Wren—I want to make it clear—I am now talking not of box office; I am talking what they paid to Columbia Pictures, the film rental.

A. Yes, sir.

Q. Randolph paid film rental to Columbia Pictures, round figures, more than $50,000; is that correct? Look at your figures.

(3603)

A. Yes, sir.

Q. And what was the highest in a week that you ever paid to any motion-picture company? And I suppose once again we are back to NOT AS A STRANGER; right? That is the best you ever did?

A. Yes, sir.

Q. What did you pay film rental? You took in 34,000 on your best week. Now, what did you pay film rental?

A. About 27,000, 28,000.

Q. 27,000?

A. Yes.

Q. Or 28? Do you want me to make it 8?

A. Make it 7. That is all right.

Q. All right; so that Columbia, when it played at the Randolph, twice your size, took in in one week $23,000 more, for one week, collected film rental in one week, $23,000 more than you ever paid on any picture—and this only happened once, this 27,000—we agree on that, don't we?

A. Yes, sir.

Q. The highest you ever paid, they beat you, and Columbia received $23,000 more for one week; correct?

A. Yes, sir.

Q. I am only going to take one or two more illustrations in order to save time, sir.

(3604)

Now, the second week, we know that the pictures drop, usually, week after week; that is a steady pattern, isn't it?

A. Yes, sir.

Q. That is established. Now, the second week of the CAINE MUTINY at the Randolph, the theatre that is twice your size, was how much at the box office?

A. $40,000.

Q. Second week, $40,000; and what was the highest second week at the box office you ever took in at your theatre in the entire period of suit? And we come back to that one picture, NOT AS A STRANGER, right?

A. I think it was twenty-five eight or twenty-five—

Q. Twenty-five. Well, for round figures I will take twenty-five.

A. Oh, twenty-five; yes, sir.

Q. So that for the second week, Columbia Pictures, by selling this to the Randolph instead of to the Viking, took in for the second week six—

Withdraw it. I am wrong.

The box office took in $15,000 more—

A. Yes, sir.

Q. —the second week than you ever did in your entire history of your theatre for a second week; is that right?

(3605)

A. Yes, sir.

Q. And, of course, this would be true the third, fourth, fifth, and sixth weeks, or shall I demonstrate it? Will you accept that? This would be true all the way down the line, wouldn't it, that kind of big difference, differential?

A. No. After this now we are on even footing again.

Q. Are we?

A. Yes, sir.

Q. Well, let us see.

A. $29,000?

Q. Well, let us see.

A. The Viking can gross $29,000, sir.

Q. Well, not, not can it. Your third week. What was the third week at the Randolph?

A. The third week at the Randolph? 29,000.

Q. And what was your highest third week?

A. 18.

Q. How much?

A. 18.

Q. Well, that isn't the same. That is $11,000 more in one week, isn't it?

A. Yes, sir.

Q. You don't mean they equalize, then, do you? Now, do you want to correct me on the fourth week? I say it is the same.

(3606)

I mean, a big differential. I am not giving you the exact figures, unless you want me to put them on. Would you like me to take the fourth week for one more test?

A. Yes, sir.

Q. All right. Give me the fourth week at the Randolph, twice the size of the Viking. How much income at the box office?

A. Oh, the Randolph? Just a moment, sir. Twenty-two five ninety-seven.

Q. Let us make it twenty-two even; and what is the highest you ever did for a fourth week? We come again to NOT AS A STRANGER; right?

A. Yes, sir—sixteen.

Q. Sixteen. That is $6,000 on a 22,000 amount, $6,000 difference, more intake at the box office; right?

A. Yes.

Q. Now, won't you agree with me without my continuing this, that it continues, although in decreasing proportions as you go down; there is a differential in favor of the Randolph as we go along?

A. No, sir.

Q. What is that?

A. I mean in this particular instance; yes, sir;—

Q. Yes.

(3607)

A. —but by and large pictures of the caliber of the CAINE MUTINY would have held up better.

Q. In this particular instance, yes?

A. No, sir; no, sir.

Q. All right; in this particular instance you say the fifth week it isn't true?

A. Oh, no. I say it will come down in proportion, but, by the same token, with this caliber of picture, it would have gone up at the Viking, in any theatre of a thousand seats it would have gone up in the lesser weeks. You can't compare a picture of this national film rental to the Viking.

Q. Oh, it would go up, would it? All right. Let us take your experience. NOT AS A STRANGER. That is your top-star illustration. Let us see if you are right.

A. All right, sir.

Mr. Sawyer: Well, he didn't say that, Your Honor.

Mr. Nizer: Oh, now, wait a moment.

Mr. Sawyer: He said CAINE MUTINY.

Mr. Nizer: Wait a moment. Let him say what he said, not you, please.

By Mr. Nizer:

Q. NOT AS A STRANGER played at the Viking; right?

(3608)

Mr. Sawyer: I object, Your Honor. The witness said with CAINE MUTINY.

The Court: Well, he hasn't asked any question as to what these figures are going to show. Wait until he puts down the figures and then asks a question.

By Mr. Nizer.

Q. I understood you to say that it would have held up and it wouldn't have gone down. Now, let us see what you did with your star picture. Give me the list, and make it even figures, please.

A. Yes, sir. 34,000.

Q. First week, 34?

A. Yes, sir.

Q. I will mark it this way: First week, in that way.

A. Yes, sir.

(3609)

Q. Thirty-four.

A. Yes, sir.

Q. And did it hold up the second week?

A. $25,000.

Q. Twenty-five. The third, did it hold up?

A. $18,000.

Q. It didn't, did it? Fourth week?

A. $16,000.

Q. $16,000. Fifth week?

A. $14,000.

Q. So it has dropped $20,000 in four weeks, hasn't it, steady decline, regular drop down so far; right?

A. Yes, sir.

Q. Now, let us see if that continues. Sixth week?

A. $11,136—or $11,000.

Q. $11,000?

A. Yes, sir.

Q. Seventh?

A. $10,000.

Q. Eighth?

A. $8,000.

Q. Ninth?

A. $7,000.

Q. Tenth?

(3610)

A. $8,000.

Q. Eleventh? What is the date, incidentally, of the eighth week of $8000, just the date?

A. I don't know, sir. We got it right through. I think it is Labor Day week end.

Q. That is Labor Day, isn't it? The only reason you have a little increase from seven to eight thousand between the ninth and the tenth week is that the Labor Day got in there and boosted it up a thousand?

All right. What is the eleventh?

A. Fifty-nine.

Q. Pardon me?

A. I mean, 5000 and 5000—six days.

Q. All right. Now, would you agree with me, then, that at the best picture you ever had, the highest receipts, the best showing you ever made—incidentally, this is a picture that you started 8:30 in the morning, didn't you, it was so good?

A. Yes, as the Goldman did it on the last three pictures, sir.

Q. No, no; I am not quarreling with you about what anybody else did. You went from 8:30 in the morning on this picture?

A. That is when we opened the doors; yes, sir.

Q. Did you ever do that on any other pictures?

A. Oh, yes, sir.

(3611)

Q. On how many others?

A. We had an all day and all night on PRIDE AND THE PASSION.

Q. Any others?

A. I believe we did it on GRAY FLANNEL SUIT.

Q. All right; except for those two, this was the extraordinary situation where you were able to take in patrons beginning at 8:30 in the morning, right?

A. Yes, sir.

Q. And this played over a July Fourth week end, didn't it?

A. Yes, sir.

Q. This picture; and you did one other thing you haven't done on any other picture—you increased your admission price, didn't you?

A. For the week ends; yes, sir.

Q. And for Saturday—not only the week ends, but the entire Saturday and Sunday and Monday of the July Fourth week end, didn't you?

A. Well, that is what I said—the week end, yes, sir.

Q. And thereafter on week ends?

A. Yes, sir.

Q. And you increased it from $1.49 to $1.80—31 cents a ticket, right?

A. Yes, sir.

(3612)

Q. And these receipts which you are constantly referring to as to what the Viking can do include the increased admission price, the July Fourth week end, and an 8:30 opening in the morning?

A. Yes, sir.

Q. All right; now, despite all that there was a steady decline, wasn't there?

A. Yes, sir.

Q. Do you know of any other picture you played where this happened and a decline didn't take place?

A. No. There is the same—in every theater there is a decline.

Q. Well, I thought you told me—and that is why I am doing this—that if you would have had Caine Mutiny it would have held right up or increased.

A. Yes, sir.

Q. Didn't you tell me that?

A. Yes, sir.

Q. First of all, listen to me, so we will get along and not quarrel. Did you tell me that, that you thought that if you had Caine Mutiny it would have gone up in the later weeks, not down? Did you say that?

A. It might have stayed up; yes, sir.

(3613)

Q. I will just accept your answer without any further questions. You tell me that in your opinion on Caine Mutiny that this trend would have been reversed, although you have had this trend on all your other pictures.

A. I did not say it would reverse. I said it would have held up.

Q. Well, it would change?

A. Yes, sir, on a picture of that caliber.

Q. In other words, instead of falling down, it would continue: 25, 25, 24, 24. It would hold up; it wouldn't drop, you say?

A. Right, sir, because the first week of CAINE MUTINY at the Randolph was July the Fourth as well, sir.

(3614)

Q. No doubt. Incidentally, have you ever made a calculation as to what the Randolph gross, which was $237,000, would have been if they had increased their box office receipts, box office admission price?

A. I didn't know that they hadn't.

Q. You don't know they did, either?

A. No, sir; I do not.

Q. Now, it is impossible, is it not, for a theater operator like yourself or anyone else, whether it is Stanley Warner or Goldman, no one is wise enough to predict what a picture will do at the box office, within even 5 per cent of what it will do; no one knows that in this industry, isn't that so, from an exhibitor viewpoint?

A. I would say from both viewpoints—the distributor and the exhibitor.

Q. And I would agree with you. As a matter of fact, that was going to be my next question, and I fully agree.

Neither an exhibitor nor a distributor can possibly predict before a picture is played, even within possibly 10 per cent—I have taken a conservative figure of 5 per cent—how that picture will do; is that right?

A. Yes, sir.

Q. Would you say that if I said 10 per cent, that the distributor might be out on his calculation and the exhibitor,

(3615)

that that wouldn't be too high on many pictures?

A. It might be a fair estimate.

Q. All right; now, in this case when you were through with all these assumptions you demonstrated on the blackboard that the Randolph would have taken in $237,000—that we know by hindsight—and it would have paid a film rental—this is box office receipts—and it would have paid a film rental of $146,000, I think; is that not so?

A. Yes, sir.

Q. Is that right, sir, approximately?

A. Yes, sir.

Q. And when you got through with all of your assumptions—namely, that you would have done exactly what the Randolph did at the box office, and that you further assumed you would have had all the pattrons coming in there and that you would have done it in fourteen weeks, adding five weeks—you made that assumption on top of it—when you were through with all of those assumptions, you said that if you had applied your terms to all of those assumptions, you would have paid the distributor, Columbia Pictures, $4300 more; that was your grand conclusion, wasn't it?

A. We also said something else, sir.

Q. Well, first tell me if you said this.

A. Yes, sir. We did.

(3616)

Q. In other words, the grand conclusion of all these computations and assumptions was that you would have paid to Columbia Pictures $4300 more on a box office of $237,000 and a film rental of $146,000; correct? That was what you demonstrated?

A. Yes, sir.

Q. Now—

A. Among other things.

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(3618)

Q. If neither you nor a distributor can guess within 10 per cent of the box office receipts of any picture in advance, does it not follow that to the same extent that he cannot anticipate what the film rental from that theater will be

(3619)

within 5 or 10 per cent? You can't determine in advance on a percentage engagement exactly how many dollars you are going to pay in advance, can you?

A. It is pretty obvious, if I don't know the gross, I won't know the film rental.

• • •

(3621)

Q. Now, Mr. Wren, you as an exhibitor—and, for that matter, anyone else; I am not pointing a finger at any incompetence on your part—cannot tell even when you run a picture, not only when you bid for it, but even if you have gotten it and before you play it, you cannot tell what the

(3622)

film rental will be of that picture any more than you can tell what the box office receipts will be when it is on a percentage engagement, can you?

A. Yes, it is because of that that I offered a 60,000 cash guarantee on CAINE MUTINY.

Q. All right; now, we will talk about guarantees separately, entirely apart from this. Listen to my question and let us determine this first: Isn't it true that as a theater operator—and that goes for the distributor, if you want to anticipate—no one can tell what the film rental under any percentage terms will be of the box office receipts before a picture is played, because you don't even know what it will do within 5 or 10 per cent? We have had that before, haven't we?

A. Yes, sir.

Q. So that the same answer that you gave to me for the box office receipts necessarily includes the film rental, because the film rental is computed by a percentage of the box office receipts; isn't that necessarily—

A. But, again you are subject to terms.

Q. Of course.

A. If you are considering—

Q. Of course.

A. —a 25 per cent deal as opposed to a 60 per cent deal,

(3623)

it has got to follow.

Q. Of course.

A. Well, sure.

Q. Exactly; therefore, I am asking you whether it wasn't your conclusion—and I think you said it wasn't that; you said it was something else—so let me point—have you got your demonstration sheet—

A. Yes, sir.

Q. —from which you were reading? Look at the bottom. When you were all through, the last line of all these computations, you said, "Viking would have paid $4316.39 more to the distributor." That was your final conclusion. There is not a word after that, is there?

A. That is one of them.

Q. Well, where are the others on here? Have you taken any more—

A. Viking guaranteed—

Q. No, no, no, no. I asked you one simple question: Did you have any other conclusion on this sheet that you were reading?

A. It is part of the over-all picture, and I read these other things on the sheet, too, Mr. Nizer.

Q. Sure, you did, the film rental and the terms.

A. And the guarantee.

(3624)

Q. And the guarantee.

A. Yes, sir.

Q. All right; now, all I am asking you about the conclusion is, wasn't that the demonstration to show that Columbia Pictures should have awarded it to you because you would have paid on all these calculations $4300 more? Is that your conclusion?

A. I assured them that no matter what happened they would get $60,000 more than my competitor assured them.

Q. Well, now, look, Mr. Wren. I wanted to get this settled first before going into guarantees, but since you force me into it, let me ask you whether a film rental that was paid, the $146,000 by the Randolph—right?

A. Yes, sir.

Q. And you say that you would have paid $4000 more, $150,000; right?

A. Yes, sir.

Q. And you are talking now about a guarantee of $60,000?

A. Yes, sir.

Q. Now, a guarantee of $60,000 means that if the picture even turns out a film rental of less than $60,000, you are still going to pay $60,000; right?

A. Certainly.

Q. And if the film rental turns out to be $1 above $60,000, then, of course, the guarantee doesn't come into play; you

(3625)

have got to pay it anyhow over $60,000?

A. Yes, sir.

Q. Now, do you think that a picture that has brought in, as you are now demonstrating, $150,000, that a $60,000 guarantee is significant under those circumstances? Do you?

A. Yes, sir.

Q. All right; and suppose that somebody else had offered $75,000 guarantee, would you say that that, being as it turned out, one-half, that that should automatically result in the bid nonetheless against you?

A. Comparable terms. He had $15,000 more confidence in the picture than I did; yes, sir.

Q. So that one mere confidence on the part of the exhibitor, if—

A. And Columbia, sir.

Q. And Columbia. I don't know what that means, but I will take it.

A. Well, Columbia had $75,000 in their pocket.

Q. Well, if Columbia had confidence on the basis of other showings in other cities that this picture was going to bring in from Philadelphia well over $100,000, neither of these guarantees would be a decisive factor in its determination, would it?

A. Yes; it would.

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(3626)

Q. Are you telling us now, and if you wish to make this point again, I will accept it, and we will go on to some other cases later, that if an exhibitor bids a higher guarantee than you do, that that without anything else entitles him to get the award?

A. I didn't say that. I said a higher guarantee and comparable terms, he is entitled to the picture. He is ex-

pressing more confidence in the picture than I have.

Q. And the comparable terms, irrespective of the size or location of the theatre, right?

A. Yes, sir, if he is willing to put his money—

Q. Now, you have answered, comparable terms, irrespective of the size or location of the theatre.

Now, coming back to my question, you have answered this guarantee point, we will come to other illustrations of guarantees, but at this point your conclusion, the purpose for which you did all this blackboard work with your counsel, was to demonstrate a conclusion that according to all these assumptions you would have paid to Columbia $4,300 more than $146,000 film rental; wasn't that it?

A. Yes, sir.

Q. Now, you wanted the CAINE MUTINY—this was before your time, but I think we have agreed that you can testify

(3627)

about it.

A. Yes.

Q. So I understand that you have to refer to records, it is not personal knowledge, Mr. Wren.

The Viking Theatre wanted THE CAINE MUTINY to open the Viking Theatre in July, 1954.

A. Yes.

• • •

(3628)

Q. The Viking Theatre, based on your records of the theatre, not your personal knowledge, because you weren't there, wanted THE CAINE MUTINY to open the Viking Theatre in July, 1954; isn't that correct?

A. Yes, sir.

Q. And the Viking Theatre at that time had been closed for over a year, had it not?

A. I am not sure of the time, Mr. Nizer.

Q. Well, from the records—

A. I don't know—

Q. —don't you know that this theatre, it was about a year that it was closed at that time, or do you mean it is (3629)

the year that you are not sure of?

A. I am not sure how long a time it was closed.

Q. Well, it—

A. I don't know when BWANA DEVIL closed.

Q. I can understand that. Let us say well over eight or ten months. You know that. I will not go to a year. It so happens I can supply the date for you. It is over a year.

A. All right, sir.

• • •

Q. You know, do you not, from the records of this company that originally this theatre was to open December, 1953.

Mr. Sawyer: Objected to, Your Honor. What record would show when?

The Court: Well, does he know? He is asked the question whether he knows.

(3630)

The Witness: Well, from what I know that is a misunderstanding, that is not the truth.

By Mr. Nizer:

Q. What is that?

A. That is a misunderstanding.

Q. It was a misunderstanding of what?

A. The December date was, yes, sir.

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(3632)

Q. You were present during the entire deposition which was taken of Mr. Sley in this case, were you not?

A. I believe all of them, yes, sir.

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(3635)

TWENTY-SECOND DAY

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(3637)

JAY WREN, resumed.

CROSS-EXAMINATION (Continued)

• • •

By Mr. Nizer:

Q. Yesterday Mr. Wren, we had reached the point that the Viking Theatre wanted to buy THE CAINE MUTINY, a Columbia picture, to open this theatre in July, 1954.

A. Yes, sir.

Q. You recall that?

A. Yes, sir.

Q. And I had just about reached the point that the Viking Theatre at that time, when this picture was being negotiated for, had been closed for upwards of a year. Did you check that since yesterday? Do you remember, we had a question as to whether it was a full year or not?

A. No. You told me it was.

Q. All right. So that when Columbia Pictures was considering your offer it was dealing with a theatre which had been dark and closed for a year, and it had another offer from the Randolph Theatre, which, of course, had been open for many years and had played outstanding pictures; isn't that correct?

(3638)

A. In part.

Q. And the Randolph Theatre, you will concede, will you not, had at that time a fine reputation as a fine theatre?

A. Yes, sir, but I would like to explain. The Randolph Theatre—

Q. I don't think there is anything to explain about it, a theatre having a fine reputation. I think that if you will

answer my questions, Mr. Wren, Mr. Sawyer will have you explain anything else that is necessary.

You also told us yesterday—before I go to that. You certainly, in all fairness, would not charge a distributor who had to make up his mind about two offers before him with bad faith or dishonesty if he considered such a factor as I have just indicated; that is at least a factor to consider, isn't it?

A. But, Mr. Nizer—

Q. No, just answer my question first.

A. Yes. With an explanation, sir.

Q. You want to explain?

A. Yes, sir, I do.

Q. (Continuing) That is a fact.

A. I want to explain the fact that he did not have two offers in front of him. So he had the Viking Theatre offer with a guarantee as opposed to no written offer from the Randolph

(3639)

Theatre.

Q. Well, we have been over the question with Mr. Rome, and I want to save time. They negotiated—but Columbia Pictures had no bid in the sense that everybody has to meet a deadline and put in his bid by 10:00 o'clock on a certain day. That was not the Columbia pattern.

A. We did with Columbia. Columbia wrote us a letter telling us that within five days we were to advise them.

They did have a time limit with us, sir.

Q. The five days requested—do you want me to show you the letter? You had to indicate whether you are interested in negotiating. They have what is called competitive negotiations; isn't that correct, sir?

A. Yes, sir, but with us it was in writing.

Q. Yes. It wasn't with you in writing. You chose, did you not, in this case, to send in your offer in writing, but Columbia followed the practice of competitive negotiation.

I would rather not repeat all of this. We have had it. Isn't that so?

A. Yes, sir, but—

Q. In other words, Columbia as distinguished, let us say, from Paramount, where each exhibitor was told by such-and-such a date at such-and-such an hour put in your bid, Columbia didn't do it that way; they sent you a letter and said: We

(3640)

invite you within five days to tell us whether you are interested in negotiating for this picture. If you are, we will get together and talk about it.

Wasn't that what they called competitive bidding? To be brief about it.

A. Yes, sir, competitive bidding.

Q. All right.

A. Right, sir.

Q. I beg your pardon. I meant competitive negotiation.

A. Well, with us that meant it was the same thing, sir, with the Viking Theatre—

Q. Well—

A. —whether competitive bidding or competitive negotiation.

Q. Let me show you—I would like to come back for a minute to the main subject I was talking about and not get off again on this distinction of competitive negotiation.

All right, I have before me a—it so happens this is PICNIC and not CAINE MUTINY, but I show you, this is the letter you received, it is December 7, 1955, in reply, you wrote to Columbia. I just read the first sentence.

> In reply to your solicitation letter of such a date inviting us to competitively negotiate for a license to exhibit first-run Philadelphia the motion

(3641)

> picture PICNIC, we hereby submit the following offer.

So you called it "competitive negotiation," didn't you, in this case?

A. Yes, sir, in writing.

Q. All right. Yes, it can be in writing. There is no rule against it being in writing. I am not holding a virtue for oral as against written. So let us not get off again into that, will you, please?

Now, what I was saying to you was that you would not in all fairness charge Columbia or any other distributor with dishonest practice in taking into consideration whether to give a picture to one theatre or another, aside from any other factor, that one theatre has been closed for a year, it has had no experience with it, and the other theatre has been open and has had some very successful engagements; that is a factor which you, if you were a distributor, would certainly consider, wouldn't you?

A. All things being equal, yes, sir.

Q. Now, you have explained to Mr. Sawyer that you would have played this picture for 14 weeks in order to make up the boxoffice receipts, as you put it, of the Randolph Theatre which in this case you assumed you would have had.

Now, the picture was to play July 2, 1954, wasn't it, the opening of your theatre, if you had gotten it?

(3642)

A. Yes, sir.

Q. That is when the theatre opened?

A. Yes, sir.

Q. And the national film rental of CAINE MUTINY turned out to be a seven million picture, in round figures, didn't it?

A. Yes, sir.

Q. And the nearest picture that you had with as high a national film rental was NOT AS A STRANGER, which is six million one, is that correct?

A. Yes, sir.

(Counsel confer.)

Mr. Nizer: I should leave out the one. Let us take them all in round figures. Right.

By Mr. Nizer:

Q. Then you go to the Randolph Theatre, instead of going to your own theatre, to check up what your Viking Theatre could have done with a picture that is only a million dollars apart in national film rental, as it turned out, six to seven, in other words.

A. Yes, sir.

Q. Now, it so happens that CAINE MUTINY played beginning July—I think June 30 was the opening date—but the same time as NOT AS A STRANGER played, except a different year, it is not the same year. I mean they played at the same time of

(3642a)

the year. July it began. July it began. So you even have a similar period with the 4th of July weekend if you had gone to your own theatre on NOT AS A STRANGER; is that right, sir?

A. Yes, sir.

(3643)

(Mr. Nizer writes on blackboard.)

Q. Now, I am going to put down a comparison on CAINE MUTINY. You read them off to me.

A. The gross?

Q. Yes. Just in rough figures.

A. $71,000.

Q. Here, we will put the Randolph, which is 2000 seats. And that is CAINE MUTINY, and we will put down just in rough figures the weekly grosses. Will you read them off?

A. 71,000.

Q. Go ahead.

A. $40,000.
$29,000.
$22,000.
$19,000.
$17,000.
$14,000.
$12,000.
$10,000.

Q. That is of course each week in succession. I don't have to mark them. (Indicating). Third, fourth week, and so on, right?

A. Yes, sir.

Q. Now I am going to put down your experience at the Viking

(3644)

Theatre with NOT AS A STRANGER, you understand?

A. Yes, sir.

Q. Not the same picture. In other words, take your own experience with the closest picture you had.

A. Right sir.

Q. Go ahead.

A. $34,000.
$25,000.
$18,000.
$16,000.
$14,000.
$11,000.
$10,000.
$8,000.
$7,000.
$8,000.
$5,000.
$5,000.

Q. Now, this played nine weeks, is that right?

A. Yes, sir.

Q. Now, suppose we cut them both off to nine.

Two, four, six, eight, nine (indicating). How much did the Randolph do, the theatre that has 2000 seats against your 1000?

(3645)

A. $237,000.

Q. Now would you give me the figure for nine weeks, leaving this aside, these three weeks aside for the moment so as to equalize them in weeks for a moment.

A. It looks like $143,000.

Will you check that for me, sir?

Q. $143,000.

A. Yes, sir.

Q. So that on the closest picture that you had in your own theatre for the same period of time—

Mr. Sawyer: $148,000, I believe.

Mr. Nizer: $148,000 is it? All right.

By Mr. Nizer:

Q. You did $148,000—

Juror No. 9: No, one hundred forty three.

By Mr. Nizer:

Q. —instead of $237,000, but when you made the computation that Mr. Sawyer made on this board to prove that Columbia should have given you the picture, you assumed that you would have made this amount and not what you did at your own theatre, is that right?

A. I didn't say anything about nine weeks, sir.

Q. I say if you took nine weeks, you took all the Randolph. I am taking nine weeks for a moment. Then I will take eleven.

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(3646)

Q. But you for your illustration—I think you have answered the question—took the Randolph experience and

the figure in making your computation as to what Columbia should have considered you would have done, but you didn't take your own.

Is that right so far?

A. Yes, sir.

Q. Now let's add the fact that you played how many weeks, 11 or 12?

A. 12 weeks, sir.

Q. 12 weeks. So let's add the other three weeks. In other words, let's give you three more weeks on this picture.

$166,000.

Q. Even then, with three more weeks, it is $166,000 as against $237,000, right?

A. Yes, sir.

(3647)

Q. So for your computation you ignored this at the Viking and you took the Randolph, correct?

A. Yes, sir.

Q. Now, in your offer on CAINE MUTINY to Columbia Pictures you had a hold-over figure, didn't you?

A. I believe we did, sir. I would like to see the offer.

Q. Yes, you did. I show this to you.

Well, you haven't got it on your list but I am trying to be fair about it and give you a hold-over because it is in here. Here is the hold-over. Here is your proposal with the hold-over of $8500. See, you ignored that in your list. I think you should be given credit on that, correct?

A. Yes, sir.

Q. So I want to make an allowance for that because it could have played longer had you had CAINE MUTINY, isn't that a fair thing to do?

A. Yes, sir.

Q. Even though you omitted it.

Now let's then be fair about it and take your hold-over clause and apply it, because that is what you are do-

ing, you are taking the terms of your offer and applying it as if you had the picture, is that correct?

A. Sure.

(3648)

Q. But you are using the Randolph for receipts, do you follow me so far?

A. Yes, sir, I do. Using our hold-over figure with the Randolph receipts.

Q. That is what you are doing. You are taking your hold-over figure and assuming you would have had the Randolph receipts.

Now I am going to go along with you on that. I am not going to say you should not have taken the Randolph. I want to see how it works out.

A. May I ask one thing, sir?

Q. Yes.

A. Are the Randolph receipts I am taking the last weeks? Because we are taking the over-all picture on a 14-week period.

Q. No, no, I am going to do it just as your terms suggest. If you had a hold-over for the ninth week, it said—

A. Yes, sir.

Q. —in which event it would play the 11th week.

A. Yes, sir.

Q. I am going to follow your terms, you see.

A. Right, sir.

Q. Now, you forgot to do that. That is in your favor but I want to see it through.

Now I am going to therefore take the ninth week,

(3649)

and you are supposed to reach $8500 by the ninth week. If you do, it plays the 11th week.

A. Yes, sir.

Q. Do you see? Now, the ninth week was $10,000?

A. Yes, sir.

Q. So you would have reached it if you assume that you have the Randolph Theatre's which I am going along with for a minute. So you would have had another week with the $8000, right?

A. Yes, sir.

Q. Now, the next hold-over of NOT AS A STRANGER was $7900, the next week, so you wouldn't have reached the $8500. You gave me $8000. I think it is $7900, isn't it?

A. No, sir, I think it is $8000. $8000 on the 8th week, $7000 on the 9th week.

Q. Well, even so, it would be under the $8500?

A. Yes, sir.

Q. So we will take the nine weeks, and if we do that it comes out practically the same, $151,000 instead of $237,000, is that right?

A. Yes, sir.

Q. II think you better tell the jury, just so that it is clear, what a hold-over is. It may not be clear by this time, I am

(3650)

not sure. What does a hold-over clause mean? It means—

A. The hold-over clause means if you arrive at such-and-such a figure under such-and-such a condition the engagement will be continued an additional week.

Q. In other words, when you say "such-and-such a figure" you mean if you put in $8500 and then the 9th week you have reached $8500 you have a right to play it another week?

A. Yes, sir.

Q. If it doesn't reach it, then the engagement is over. Isn't that what it means?

A. Yes, sir.

Mr. Sawyer: A right?

The Witness: A commitment.

Mr. Nizer: A requirement.

Mr. Sawyer: Yes.

Mr. Nizer: Either way, yes.

By Mr. Nizer:

Q. Now, you told us yesterday that you made your computation on the theory that you would have played 14 weeks. Now, under your contract terms it would have been 9 weeks, wouldn't it, even with the hold-over?

A. Not using these figures in this manner, no, sir.

Q. Well, how did you come to 14 weeks? By what method did you calculate 14 weeks to reach the boxoffice receipts of the

(3651)

Randolph at 9? How did you get those five extra weeks?

A. Basing it on what COUNTRY GIRL did in a 994-seat theatre.

Q. So now you not only went to the Randolph but you also went to the COUNTRY GIRL?

A. Certainly. You are speaking of comparable theatres. There is a theatre smaller than mine that outgrosses CAINE MUTINY.

Q. So in this case you are willing to go to a comparable theatre, the Midtown Theatre, for this purpose?

A. Figuring it both ways, yes, sir.

Q. And in this case when you go to this comparable theatre, the Midtown, you pick as the picture COUNTRY GIRL, which also had a national film rental of what, $6,000,000?

A. Roughly, yes, sir.

Q. The same as NOT AS A STRANGER?

A. Yes, sir.

Q. But you don't want to take your own experience with NOT AS A STRANGER, which is a $6,000,000 picture; you wanted to still go to another theatre to find out what you should get, is that right?

A. On a seat basis, yes, sir, definitely.

Q. Not on a seat basis.

A. To show that a small theatre can do as well as a large theatre.

(3652)

Q. Mr. Wren, I am not asking you about seats at the present moment. I am asking you how you got your 14 weeks and you tell me that in order to get 14 weeks you now went to COUNTRY GIRL at another theatre which had a thousand seats roughly.

A. To show the evenness of the drop that we discussed yesterday, dropping from seventy one to forty.

May I continue, sir?

Q. You told me you wanted to demonstrate the evenness of the drop?

A. Yes, sir.

Q. You could have done that with any picture. It didn't have to be COUNTRY GIRL, it could have been any picture at any theatre would have demonstrated the evenness of a drop, wouldn't it?

A. No, sir, it would not . . .

• • •

Q. If you answer the question then you can explain it.

(3653)

A. Right, sir.

Q. Can you give me a single picture in all your two and a half years' experience at your theatre where there wasn't a drop one week after the other?

A. Certainly, but not the same degree this drop is, sir. This is a $31,000 drop as opposed to a $5,000 drop with COUNTRY GIRL.

Q. You want to take COUNTRY GIRL. All right, let's take COUNTRY GIRL.

Incidentally, you took—this is the Midtown Theatre?

A. Yes, sir.

Q. Roughly a thousand seats?
A. Yes, sir.
Q. 997, I think.
A. 994.
Q. Now we will take COUNTRY GIRL, right?
A. Yes, sir.
Q. All right. Now give me those figures.
A. $33,000.
$28,000.
$29,000.
$23,000.
$17,000.

(3654)

$15,000.
$13,000.
$12,000.
$14,000.
$14,000.
Q. That is nine. I will draw a line there. Go ahead.
A. $10,000.
Q. What is after the first fourteen?
A. Fourteen again.
Q. All right.
A. $10,000.
$9,000.
$8,000.
$6,000.
$5,000.
A total of $243,000.
Q. For how many weeks?
A. 15 weeks, sir.
Q. Now, we have a 15-week period, a 9-week period, and your own was 11 weeks, right?
A. Yes, sir.
Now, by taking 14 weeks—
Q. No please. There is no question before you, sir.

A. All right.

(3655)

Q. Let me ask you a question. You say that the Midtown and the Viking are comparable theatres?

A. Yes, sir.

Q. All right. Now, therefore, it is obvious from playing pictures of the same national film rental—$6,000,000 and $6,000,000, right? These two, NOT AS A STRANGER and COUNTRY GIRL, both $6,000,000?

A. Yes, sir.

Mr. Nizer: Will Your Honor pardon my back?

By Mr. Nizer:

Q. Playing two pictures of $6,000,000 each, you observe —give me the gross so we will have it for the nine weeks. How much is it? This was $143,000. How much was this?

A. I haven't added it up.

Q. Haven't you? All right. I will do it. Check it. $184,000 for the nine weeks. Is that about right?

A. Yes, sir.

Q. So with these two comparable theatres, with the pictures both with the same national film rental, COUNTRY GIRL and NOT AS A STRANGER, the Midtown nevertheless threw off a larger gross for the same period of time of nine weeks, of $40,000, roughly, right?

A. Yes, sir.

(3656)

Q. Does that indicate to you that in addition to comparability of size there may be such a thing as location having something to do with box office receipts, or do you still say that location has nothing to do with it?

A. Nothing, sir. The same theatre—

Q. Nothing at all?

A. The same theatre followed that with ROMEO AND JULIET and—

Q. Don't talk. You say it has nothing and that is your answer.

A. All right.

Q. Now, nevertheless, you took 14 weeks.

A. Yes, sir.

Q. And the difference that you found after doing all these assumptions, taking the Randolph, these receipts, and applying your terms to it, comparing it with the Midtown for purposes of showing whatever you say, the difference was $4,300 in film rental?

A. Yes, sir.

Q. At the end of all those computations. And this is what you said Columbia Pictures should have guessed in advance and therefore had given you the pictures, isn't that it?

A. I did not say that, sir. I said they would have made that much more and what they should have taken into consideration was the guarantee of $60,000 and a written commitment.

(3657)

Q. Now, isn't it a fact that the reason you took 14 weeks—withdrawn.

Is it possible that it would have taken you 15 weeks to reach—

A. By deducting—

Q. Now listen to the question.

A. I am sorry, sir.

Q. Is it possible, Mr. Wren, that it would have taken you 15 weeks instead of 14 to reach the same gross as the Randolph in nine? Is that possible, sir?

A. It is possible, sir, but if you deduct the $5000—

Q. Is it possible?

A. —from the $243,000 you come to the same gross as CAINE MUTINY. That was the only reason we did that, sir.

Q. I would like to have that answer repeated, please.

A. By deducting the last week, $5,000 from the COUNTRY GIRL, a gross of $243,000, you come down to identically the same gross as you have here.

Q. Let's translate that answer, see what it means.

In the case of the Viking your offer was 90-10, 90 per cent-10 over $4,970.19, right?

A. No, sir, I don't think that is right, sir.

Q. What was it?

A. I think it was $4900.

(3658)

Q. Forty nine? Well, let's not quarrel about it. All right. Forty nine. Let's take rough figures.

Now, that means, does it, to be clear about it, that the first $4900 that comes into the box office goes to Columbia Pictures, if you had gotten this picture?

A. No. The first $4900 comes to us, not to Columbia Pictures.

Q. I mean it is taken off?

A. Yes, sir.

Q. You are quite right. I misspoke myself.

The first $4900 goes to you?

A. That's right.

Q. It comes off the first dollars of the receipts before Columbia gets a nickel?

A. Yes, sir.

Q. So if you had played this picture 15 weeks and $4900—you see this $4300 (indicating)?

A. I see it, yes, sir.

Q. And the $4900 had been taken off on the 15th week, your demonstration would have been reversed, wouldn't it?

A. No, sir. You have $6000 here on the 15th week of COUNTRY GIRL.

Q. No, no, not COUNTRY GIRL, sir; not COUNTRY GIRL.

A. Well, you asked how I made the computation.

(3659)

Q. Yes. I am saying to you that under your proposal you would have taken off let's say roughly $4900 on the 15th week, wouldn't you?

A. Yes, sir.

Q. So if you took off $4900 and the whole difference in the film rental was $4300, the reason you stopped at 14 weeks was in order to make this thing come out, didn't you?

A. No, sir.

Mr. Sawyer: Oh, now, wait a minute.

A. No, sir. Take $4900 here and see if Columbia doesn't get money. Take $4900 and $6000.

By Mr. Nizer:

Q. And how much would Columbia get?

A. Well, they certainly wouldn't reduce this.

Q. How much would Columbia get on—

A. Look,—

Q. Wait, slowly.

A. Roughly $900.

Q. $900. So you want to change this. Instead of wiping out—

A. I don't want to change anything.

Q. Please listen to me. Let's not argue. Let's answer questions. And I will try try to do the same.

On your present correction of my proposition you say the $4900 wouldn't have wiped out $4300 because

(3660)

Columbia would have gotten how much, $600?

A. I didn't say anything of the kind, sir. The $4900 doesn't have anything to do with it. Until the gross drops below $4900 Columbia is making money, and in this instance the gross was $6000 and they would have made about $900 film rental.

Q. That is what I am saying. You would have taken $900, according to your present theory, and Columbia would have gotten $900. So $4900, $4300 would have been wiped out by forty nine. That would have left $600 difference.

Mr. Sawyer: Oh, this is—

A. I don't get your arithmetic, sir. This just doesn't make sense.

By Mr. Nizer:

Q. I don't think it does, but this is the way you did it, sir.

A. No, it is not the way I did it.

Q. Let's see if it isn't. I will give myself a little room here.

On your sheet – do you have it?

A. Yes, sir.

Q. Read the last sentence, please, of your demonstration on your sheet.

A. Viking would have paid $4316.39 more to the distributor.

(3661)

Q. Forty three hundred and what?

A. $16.39.

Q. That is the last conclusion on your sheet?

A. Yes, sir. On the over-all engagement they would have paid that much more money to Columbia Pictures.

Q. If you had done what the Randolph did and all the rest of it, right?

A. Yes, sir.

Q. All right. Now, after all that you concluded that the Viking even on your assumption would have paid—let's put it in round figures—well, we better keep the figures—$4,316 more than the Randolph paid? That was your—

A. More than $145,983.61.

Q. And you did this by assuming that you would have played it 14 weeks instead of 9?

A. Yes, sir.

Q. And of course that assumption is in violence of the fact that under your terms of your offer you would have only played it nine weeks. You have already conceded that, haven't you?

A. No, sir. Under the COUNTRY GIRL, you will see on the 9th week it was $14,000 so I hold it for 11. On the 10th week it is $10,000 so I hold it for 12 weeks. On the 13th week it is $9,000 and I hold it for 14 weeks. Right?

Q. Yes. And then? In other words, you went—

(3662)

A. I have a $8500 hold-over figure and if I have $8000 gross I am not obliged to hold it any longer, so it comes out to 14 weeks.

Q. You went to the Midtown to make that computation?

A. Yes, sir, to show that—

Q. Now, you told us a few moments ago—well, now, wait a minute. If you tell me that a thousand-seat theatre can do it, you didn't take the $184,000 of that 1000-seat house, you took $237,000.

A. I took the 14-week gross.

Q. Answer my question, please.

A. I did not take that gross, sir, and you know perfectly well I did not.

Q. I don't know anything of the kind, sir. Now, please answer my question.

A. I have, Mr. Nizer.

Q. Listen to the question. Did you not, in making your computation for Mr. Sawyer, take the $237,000 Randolph gross as the base upon which you applied the terms of your offer?

A. I did, sir.

* * *

(3663)

Q. You did take in your calculation $237,000 of the 2000-seat Randolph and you did not take the comparable theatre gross of $184,000 even at the Midtown, did you?

A. No, sir. I took a 14-week gross at the Midtown, not $184,000, sir.

Q. And how much is the 14-week gross at the Midtown?

A. $237,000.

Mr. Sawyer: What?

The Witness: $237,000 in 14 weeks.

By Mr. Nizer:

Q. At the Midtown?

A. At the Midtown Theatre the gross was $243,000. Deduct $5000 and you will come up with $237,000. The last week, the 15th week, was $5000 in round figures.

(3664)

Q. Is this the 11th week here (indicating)? I am sorry to have—

A. On 14. I am not talking about the 11th week.

Q. (Indicating) Is this it?

A. That is it, sir.

Q. $225,000?

A. No, sir, $237,000.

Q. All right, $237,000. So what you did—

Mr. Nizer: May I have the figures on that, please? I think there is a calculation that is wrong.

By Mr. Nizer:

Q. Mr. Wren, did you ever make a computation with your lawyer as to how you got to this figure of $237,000?

A. Certainly. I told you I worked on Schedule A, B and C, sir.

(3665)

Q. And did you change the figure for the fourteenth week by adding here a figure of $5568.41 for the fourteenth week to make it come out exactly the same as the Randolph gross? Is that how you did it?

A. One of the computations, sir, was taking the $243,000 that COUNTRY GIRL earned and deducting the last week of that gross, which was $5000, to bring it down to a comparable 237.

Q. All right; now, will you answer my question. Did you artificially, arbitrarily, fix up a figure for the fourteenth week having no relationship to any gross at any of these theaters?

A. We had several sets of figures, sir.

* * *

(3668)

Q. My question is, without showing you your schedule, isn't it a fact that when you made up these figures you arbitrarily fixed a figure for the fourteenth week which would make the total come out exactly the same to the penny of the Randolph?

Mr. Sawyer: Objected to, unless he says what he means by "these figures."

The Court: Overruled.

Mr. Sawyer: If he means on Schedule B or on the board.

Mr. Nizer: The same calculation. It is called the projected, Viking projected gross on this picture.

The Witness: No, sir, as I explained to you, sir.

(3669)

By Mr. Nizer:

Q. Wait. Wait. Slowly. You say, "No, sir?"

A. That is what I said.

Q. Your last figure, in order to make it come out to $237,000—let me give you the exact figure—$604.18—the last figure that you put in for the fourteenth week is $5568.41, which bring us to the penny to the Randolph; isn't that what you did?

Mr. Sawyer: Objected to.

The Witness: That was one of them, sir.

Mr. Sawyer: Objected to.

The Witness: Yes, sir.

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(3671)

By Mr. Nizer:

Q. Let us take, Mr. Wren—you can look at anything counsel gave you—I put down round figures, 33,000. Fill it out. It is 681, isn't it, that you put down?

A. For which picture, sir?

Q. Well, the Midtown. Now, you went over there, didn't you?

A. I got COUNTRY GIRL right in front of me; yes, sir.

Q. Isn't that what you did?

A. On the fifteenth week—pardon me—on the fifteenth week here of COUNTRYGIRL ,it is 52, 65, 37, the same as it is here, 52, 65, 37.

Q. The same as it is?

A. On COUNTRY GIRL; yes, sir. Right there it is.

Q. Mr. Wren, we are not talking about the same thing, and if you will be patient, I will give you a chance. Just answer my questions. Counsel has stated that these aren't the same figures. The only reason that that is, is that I made them even. Read the next one, 28,000 what?

A. 28,000.

Q. Even?

A. No. You mean these are actual COUNTRY GIRL figures?

Q. The ones that you used to make up your projection of $237,000. Give me the exact figure.

Mr. Sawyer: Objected to. He didn't use it to

(3674)

make up that projection.

By Mr. Nizer:

Q. The 237 of the Randolph gross.

A. On which schedule are you referring to, sir?

Q. Just tell me first about the Randolph.

A. The COUNTRY GIRL here—

Q. Listen to me, sir.

A. I am listening to you.

Q. What is the Randolph gross? Have you got it in front of you?

A. $237,604.18.

Q. All right; now, then, let me ask you this: When you were through with your computation of the Midtown on COUNTRY GIRL—is that what you did? You took the Midtown, COUNTRY GIRL?

A. Yes, sir, as I explained it.

Q. Did it come out to $237,604.18? Just answer that.

A. Yes, sir, by deducting—

* * *

(3673)

Q. In Mr. Sawyer's demonstration on the blackboard, did you not assume that you would have had to gross at the Viking on $237,604.18?

Mr. Sawyer: Oh, that is different. Ask him that.

The Witness: Yes, sir.

By Mr. Nizer:

Q. All right; and the way you got $237,604.18 to the penny was to take as the fourteenth week a figure which you made up?

A. No, sir.I told you what we did, sir. We deducted $5000 from the 243 to compute these figures, and this has absolutely nothing to do with it.

Q. And are you telling this Court and jury by deducting

(3674)

$5000 you came out to the penny $604.18, that that is a coincidence?

A. I am further saying, sir, that this is not—

Q. No. Will you answer my question.

A. —my writing and these are not my figures. This is counsel's figures—

Q. Oh.

A. —from previous counsel. I did work on these figures with sertach pads of every type and description, but this is not my writing, sir.

Mr. Sawyer: Well, now, would you ask him if it is mine, then? Didn't you testify—

The Witness: No, sir. It is not.

Mr. Nizer: No. It is the previous counsel.

The Witness: Right, sir.

By Mr. Nizer:

Q. Did you testify that you helped to make up these schedules?

A. I certainly did, sir.

Q. All right; now, whether it is your writing or not, you sat with him and you worked these things out together, didn't you?

A. Yes, sir.

Q. Now, all I am asking—and I would like to make progress and not be stopped on this, sir, if I can—no matter how you

(3675)

did it, you came out to the exact penny by taking as the fourteenth week a figure which you created with your counsel to make it come out exactly the same?

A. That is not true in this case, sir.

Q. All right.

A. I told you what we did.

Q. All right. You have answered. If it isn't true, you are then telling us—and I will drop it at that—you are then telling us that by sheer coincidence by using the Midtown figures it happened to come out $237,604.18?

A. I didn't say that, sir. I said I deducted—

Q. Well, now, if it isn't a coincidence, didn't you artificially create, arbitrarily write in that figure to make it come out that way? That is all I am asking you. Didn't you?

A. Which figure, sir? This figure we are using here is $237,000.

Q. I withdraw it.

A. I didn't arbitrarily put down any figure here, sir.

Q. We will leave it that way.

Now, on this picture, sir, who else made offers, according to your research now of the records? We have opened up all the records. We are going to talk of all of them. Did the Trans-Lux make an offer on this picture?

(3676)

A. I believe they did, sir.

Q. Did Arcadia? Did The Studio?

A. I am not sure about The Studio. I believe the Arcadia and the Trans-Lux did.

Mr. Sawyer: Does Your Honor understand that my objection is all—not to this where he is comparing what we did on the board, but to all questions about what happened, who said what, and as to whether other people made offers on CAINE MUTINY, because it was a year before the witness appeared on the scene, not this part where he compared what we did, but where he is going to ask him who made offers and whatnot, he wasn't there, and I object, because it will be repetitious, because Mr. Sley will testify to it,

and I presume he will be cross-examined on the same thing.

By Mr. Nizer:

Q. Mr. Wren, before I leave this, what is the date of the Midtown on the $29,000?

A. I don't understand the $29,000, sir.

Q. What is the date of that? That is all.

A. Oh, the $29,000 gross?

Q. Yes.

A. February the 15th to the 21st.

Q. Now, do you recall that that was the Academy nomination national broadcast, television broadcast for COUNTRY GIRL?

(3677)

A. I don't know whether it is a broadcast. I believe that was the nominating week.

Q. What is the date of the 14,000 here?

A. I believe the second 14,000 is the night of the awards. I think it is in the first week in April, sir.

Q. So when the receipts go up instead of down, there is usually in your experience some special event that accounts for it; isn't that so?

A. Granted.

Q. Thank you. Now, you told us that there was a Trans-Lux proposal here and, of course, you had access to it and your counsel has seen it. If you took the Trans-Lux offer and used your method of assuming that the Trans-Lux would have had the same receipts as the Randolph, wouldn't the Trans-Lux Theatre pay even more—

A. May I—

Q. —rental than the Viking?

A. May I see the bid, please?

Q. Well, I will give it to you. I will see it. I will show it to you.

90/10—here it is; you can look at it and I will just read it off quickly—90/10 over a house expense of $3100, dis-

tributor to pay all advertising—and, incidentally, did the Trans-Lux give a guarantee?

(3678)

A. $51,000.

Q. $51,000 guarantee. The first offer you made for this picture you gave a $44,000 guarantee; right?

A. I am not certain of that. I think it was less than the second offer.

Q. Now, I hope I don't have to make the entire calculation, but by looking at that offer of the Trans-Lux is it not evident that if they did the same thing, we did the same thing for the Trans-Lux that you have done, namely, to assume that the Randolph box office receipts would have been attained by the Trans-Lux, just as you say the Viking would have attained the Randolph's, they would have paid a higher film rental on that basis than even the Viking, wouldn't they?

A. Depending on the number of weeks of the computation, it is possible; yes, sir.

Q. And will you accept—and I will give to it your counsel to check, or to you, during the recess; I am trying to save 15 minutes—will you accept the fact subject to that check that if you did the same for the Trans-Lux, it would have paid $1710 more each week than the Viking on the same type of calculation, subject to your check?

A. Well, you couldn't use the same calculation, because the gross would not have been there in the 490-seat theater.

Q. Ah.

(3679)

A. It would take them a longer period of time.

Q. Ah, I see; the Trans-Lux is 490 seats?

A. Yes, sir.

Q. The Viking is a thousand?

A. Yes, sir.

Q. So the Trans-Lux is half the size, roughly, of the Viking?

A. Yes, sir.

(3680)

Q. The Trans-Lux is operated by the man called, what, Brandt?

A. Yes, sir, Harry Brandt, Trans-Lux chain.

Q. That is 500 seats?

A. Yes, sir.

Q. You are 1000?

A. Yes, sir.

Q. And you are telling us that this shouldn't work because they are half the size of you?

A. I didn't say it shouldn't work. I said they would need a longer length of time. They have proven with DETECTIVE STORY and those pictures they can run 28, 29 weeks.

Q. But if you took a longer period of time you would say that you will concede, subject to your checking your records, that the theatre that should have been awarded this picture on your basis was the Trans-Lux, they were better than the Viking, right?

A. I haven't said anything of the kind.

Q. Subject to your checking.

A. Subject to check, yes sir. They bid and they put up a cash guarantee.

Q. Now, the Studio bid an offer here. How large is the Studio?

A. I think it is 378 seats.

(3681)

Q. It is 400 by the chart, if you want to accept that. We have agreed upon the chart. 400. Will you accept that?

A. Yes, sir.

Q. All right. Now, the little Studio Theatre made an offer?

A. Yes, sir.

Q. They guaranteed $40,000, and here are their terms, I show it to you, 90/10 over $2,500 a week, instead of $5,000 a week expenses, as you had.

Now, then, will you again, subject to checking—I will give you these figures over the noon hour if you wish, it is all worked out. Will you consider subject to the check that if you use your technique of assuming that the Studio Theatre, and give them enough weeks, maybe a year if necessary,—

A. Right, sir.

Q. Now, let us assume all that, which you did.

A. Yes, sir.

Q. (Continuing) Taking the Randolph gross, that they would have paid a larger film rental than the Viking by $31,500 on the same kind of a computation.

Mr. Sawyer: Objected to, Your Honor.

I should have objected in the case of the Trans-Lux, but I was distracted with something that I expected

(3682)

to use in re-redirect.

I object, Your Honor, to the comparison basis of the Trans-Lux, the Studio, or any other theatre not one of the defendant exhibitors, because it is irrelevant to the issues which the direct examination at this point sought to establish.

If it were a fact that another theatre not one of the defendant exhibitors should have gotten the motion picture in preference to the defendant exhibitor or in preference to the Viking, this, Your Honor, would not tend to rebut our contention, because we do not claim here anything with respect to whether other theatres were favored or unfavored. Our contention is that between the Viking and the defendant exhibitors,

the defendant distributors favored the defendant exhibitors.

We do not take any position, nor should we, nor do we have to with respect to whether or not the defendant distributors favored or disfavored other independents, who would be on their own in this respect. They would know whether they were favored, whether they were discriminated against, or not.

So that therefore to prove—and I assume it might be somewhat lengthy—it could save time, if Your Honor would agree with me, that to prove the superiority or

(3683)

inferiority of bids of theatres not among the defendant exhibitors would not tend to prove or disprove an issue in this case.

Mr. Nizer: Your Honor, obviously this is proper cross-examination in order to demonstrate the complete fallacy and artificiality of all these constructive figures because I am going to show it in two ways with other bids and offers. On this technique and theory I want to show by cross-examination, in order to counteract and refute the artificiality of this, that small theatres, like the Studio and the World Theatres, of 400 seats—of course, I don't say it is so, I am just saying on his technique it becomes so—would gross more, would pay more film rental than the Randolph Theatre with the 2000 seats, and even than the Viking Theatre.

In other words, if he could say that a theatre half the size of the Randolph will pay more film rental, then it is just as fair to say that a theatre half the size of the Viking would have paid more film rental, and the thing becomes absurd, because you have the little 400-seat theatre paying $31,000 more film rental than the Randolph or the Viking.

Now, I am going to demonstrate one more thing, and I might as well advise counsel. I am going to demonstrate

(3684)

that on his theory, this artificial technique, most of the awards given to the Viking should not have been given to the Viking, they should have been given to the Trans-Lux, the Studio, the World, with half the seats, because of his method of computation they had the best offers, and that would lead to the conclusion, either that the motion picture companies whom I represent favored him and discriminated against others, which, of course, I do not contend, they favored nobody, they used their best judgment, or it would demonstrate that this calculation is completely artificial and absurd, which I am obliged and compelled to spend time on, because each picture was presented with this calculation.

So I think this is highly proper cross-examination.

Mr. Sawyer: Your Honor, suppose this proves what Mr. Nizer says it would prove. Let us assume that.

If he proves that pictures that were awarded to the Randolph or to one of these other theatres on our theory should have been awarded to the Trans-Lux or to the Arcadia, how would that in any way rebut our contentions in this case? Maybe they should have been.

What we say is that between our theatre and

(3685)

those of the favored exhibitors, those of the Stanley Warner and the Goldman chains, it is between those two that we complain.

Maybe they should have awarded some of these to the Arcadia and the Trans-Lux. I should think you could find examples. But our contention is that where they awarded it to the inferior bid it was that of one

of the exhibitors among the defendants, not whether it was the Arcadia or the Trans-Lux.

Suppose he does prove that, all that would tend to establish would be a cause of action perhaps, totally outside this lawsuit. Will we now try in this lawsuit whether or not there has been discrimination in favor of or against the Arcadia or the Trans-Lux?

They are not parties to the suit, neither defendants nor plaintiffs. So that if all that Mr. Nizer was to attempt to prove was in fact proved, and, yes, tenfold, it would not in any way affect an issue in this case, because we are not contending that the Trans-Lux or the Arcadia bids were better, or worse, or inferior, or should have gone, or shouldn't have gone. Our comparison is only between the parties to this lawsuit, not those outside.

I submit, Your Honor, that this will be again

(3686)

opening up a very elaborate, very time-consuming and very lengthy examination, none of which was referred to.

We did not make comparisons with those other theatres and I should think that he would have been the first to object if we had. If we had come in—and, of course, this will be opened up now I suppose because we come back again—and said, not only did we get pictures that we should have because they were awarded to the favored exhibitors, but look at all these pictures they gave to the Arcadia and the Trans-Lux where our bids were better.

That we did not do. I should have thought that had we tried to—I wouldn't even have attempted it because Your Honor so rightly would have sustained their objection to it. You would have said, well, if they were favored, why didn't he join them as defendants? And I think that the same exactly applies, because

they propose to do the other, they would take ones where they should have gotten it, we would then come back and open up all this to show where we should have gotten pictures that the Arcadia and Trans-Lux got, and therefore we were further discriminated against. It would open up, Your Honor, a large area, the 85 pictures will be increased to perhaps 100 and some, because we have left them all out.

I submit it is improper because it does not

(3687)

prove an issue in the case one way or the other, and, secondly, it will be at great length, great length.

I assume that Your Honor will let me do the same thing then with pictures that the Arcadia got which we think we should have gotten, which I have totally refused to do and refrained from doing.

Mr. Nizer: That is not my objective nor am I engaging in such an enterprise, and I am sorry if Mr. Sawyer misconceives the purpose of this cross-examination. I am not trying to show that the Studio or World Theatres should have gotten these pictures. That preposterous on its face. Of course they shouldn't have. Of course the Randolph offer was better.

I am trying to show that the way the Viking seeks to demonstrate why its offer was better is an absurd proposition and leads him into the trap that most of the pictures he got he shouldn't have gotten, it should have gone to the Trans-Lux, which is half of his size, because if he used this kind of computation their offers always come out better.

It is inherent in the mathematical errors that this gentleman has made with his counsel, and it is my function to try to demonstrate that by whatever absurdity it leads to.

The mathematical errors that if I offer 20 per
(3688)

cent and somebody else offers 20 per cent, and if I take my grosses at my theatre that is all right, if the distributor says, well, let us see what the Viking can do on this, by prior experience or the kind of theatre it is, by the number of seats, but if I the Viking offer 20 per cent and if I say, but I am going to take the Mastbaum gross and apply it to my theatre, or the Radio City Music Hall gross on this picture, and apply it to my theatre, and lengthen out my weeks until I reach it, although his own offer limits him in this case to nine weeks, and he stretches it to 14 in order to get there, on that basis you could prove that the smallest theatre around the corner is better than Radio City in its offer, and since that is what he is charging us with, I am demonstrating by cross-examination the weightlessness, the absurdity of his contention in every way that I can.

I am not trying the cause for the Trans-Lux or the World, or the Studio. I do not intend to go into any contention that they should have had the offers, I am trying to get the plain admission, which I already have in the case of the Studio, that on his method of computation his offer wasn't even the best on his own theory.

The World that made an offer, the Studio, and gave $40,000 guarantee should have gotten the picture.

He is charging us with not accepting the best
(3689)

offer. Well, his wasn't the best offer upon CAINE MUTINY according to his calculation. The best offers according to his calculation were the two other offers that were made, the Studio and the Trans-Lux.

Indeed, Your Honor, it works out so absurdly that the smaller the theatre the better the offer is sup-

posed to become, because the moment you take a small overhead charge and apply it to a huge gross, obviously you are better off than taking off the big overhead charge.

This whole thing is fallacious from beginning to end, according to our contention, and I am trying to demonstrate it.

It is rather difficult to burden the jury and the Court with all these figures, but he has raised picture after picture, and it is my duty, unfortunately, I am compelled by the admissibility of this evidence to counteract it and I am sure Your Honor will at least give me an opportunity to demonstrate what weight should be accorded to this.

So I ask that the prior ruling be sustained, Your Honor, in the same way.

Mr. Sawyer: Your Honor has been indulgent, but honestly, if Your Honor is persuaded to keep this out, it will save far more time than these few additional words of mine.

(3690)

I think the rabbit goes in the hat in Mr. Nizer's argument, sir, when he says they have contended that the best offer was refused.

Well, now, you see, if we contended that, of course, he could show that with respect to these other theatres, but we didn't contend that, and we were at some pains not to contend that, not because in many cases we do not believe it was the very best of all, but because it was not within the legal issues of this case.

We didn't contend that the best offer was not taken, we said that between our offer and those of the exhibitors favored by the defendants, the best between those two was not obtained.

We made absolutely no assertion with respect to offers, nor did we consider, nor considered it our busi-

ness to consider, offers of others. It is outside of the scope of this case.

The Court: Objection overruled.

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(3691)

By Mr. Nizer:

Q. Mr. Wren, I shall leave CAINE MUTINY with the final question which was the subject of our discussion between counsel, namely, that subject to your opportunity to check the computations which I have made, I would like you to do the same and concede, subject to that, the same fact, that if the Studio offer for CAINE MUTINY, which is 90/10 over $2500 with a guarantee of $40,000 had been applied as you did, that the Studio would have paid $31,500 more than the Viking on the same kind of computation. Now, subject to that check.

A. How many weeks, sir?

Q. The same extension according to its own offer.

A. Very well, sir.

Q. In other words, the same technique.

A. Yes, sir.

Q. You will accept that subject to the check?

A. Yes, sir.

Q. Now I go to PICNIC, which is the second Columbia picture you mentioned. You mentioned three Columbia pictures and those are the ones I am addressing myself to.

Incidentally, PICNIC was an outstanding

(3692)

picture. It had William Holden, Kim Novack, Rosalind Russell, Susan Strasberg, and it was based on a famous play which played in New York. You accept that, don't you, that it was a large and important production?

A. Yes, sir.

Q. Now, you testified that the Viking made a guarantee on that picture, offered a guarantee of $27,500. Do you recall that, sir?

A. I do.

Q. And you also testified that no one else bid for the picture. Do you recall that?

A. Yes, sir—no, I said no bid by the Randolph or the Midtown Theatre, sir.

Q. Didn't you also testify—

Mr. Nizer: May I have 1056?

By Mr. Nizer:

Q. Didn't you also tell your counsel that no one else bid on that picture?

I read from 1056, when Mr. Sawyer was asking you on direct examination:

Did anyone else bid on that picture?

No, sir.

A. I believe that is right.

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(3695)

Q. When you testified that there were no other bids, that was an incorrect statement, wasn't it?

A. No, sir. As far as I know there were no other bids.

Q. Well, didn't you when you went through all these files of the defendants recently again in order to make these computations and compare all these offers, didn't you have before you all the documents for each picture of each company?

Mr. Sawyer: Objected to, "recently again," Your Honor. The witness hasn't said—

Mr. Nizer: Leave out the word "recently."

By Mr. Nizer:

Q. Did you have them? Did you see them?

A. I believe we did, sir.

Q. Isn't it a fact that your counsel initialed each of the other offers of other exhibitors who did make offers in this case for PICNIC?

A. I would assume they did initial them, yes, sir.

Q. So therefore having seen the other offers, this answer is incorrect now? You know that?

A. I don't recall having seen any offers up until now, sir.

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(3696)

Q. It is a fact, is it not, that Stanley Warner, the Stanley Theatre, made a written offer for PICNIC?

I show you this, I show you the initials of your counsel and ask you if that is correct.

Mr. Sawyer: Objected to, the initials of his counsel, Your Honor, since it is immaterial what counsel initialed. The witness should be asked whether he has ever seen it or not.

The Court: Yes. I don't think it is necessary whether counsel initialed it or not.

A. Yes, sir.

By Mr. Nizer:

Q. You will accept that fact now in any event?

A. Yes, sir.

Q. I show you this document that the Studio made an offer on that picture in writing for PICNIC.

A. May I see our offer, too, please, sir?

Q. Which?

A. Our offer.

Q. Certainly. I will be glad to show it to you.

Mr. Nizer: May I have his? You have his.

Mr. Steinberg: Shall I give it to him?

(3697)

By Mr. Nizer:

Q. I have it here for you. Here is yours. I have it. This is your offer on that picture, right?

A. Yes, sir.

Q. Now may I have those for a moment because I want to write—

A. May I explain something, sir?

Q. I don't see that there is anything to explain at the moment.

These are offers of other companies for the picture PICNIC?

A. All submitted at different times, sir. Ours is the 7th of December, the Studio's is the 9th and Stanley Warner's is December 16.

• • •

Q. Now, Mr. Wren, you made that statement with this letter in front of you that you had sent to Lester Wurtle of Columbia

(3698)

Pictures:

Dear Lester:

In reply to your solicitation letter of November 29, 1955 inviting us to competitively negotiate for a license to exhibit first-run Philadelphia the motion picture PICNIC, we hereby submit the following offer—

Not bid, "offer."

—for the Viking Theatre.

And with this letter in front of you you still tell me that there were written bids in this case rather than written offers pursuant to an invitation to negotiate competitively with all the people in the territory?

A. Is that December 7, 1955?

Q. Yes, it is, and I don't see that it makes the slightest difference. Wasn't each exhibitor given time in which

to negotiate, sit down over a period of time under the Columbia system? Wasn't that so?

A. I signed that letter, sir, December 7, 1955?

Q. No, no, we know that at this time—yes, you did. Jay Wren, December 7.

You did, didn't you?

A. This is mine.

Q. Yes, it is. All right, now let's proceed.

A. Yes, sir.

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(3699)

The Witness: May I see the letter, the solicitation letter from Columbia on PICNIC, please?

(A document was handed to the witness.)

By Mr. Nizer:

Q. To negotiate for this picture within five days you will

(3700)

have to tell them whether you shall negotiate, is that right, so I don't have to read the whole thing? Is that correct?

A. Yes, sir.

Q. All right. Now let's go to what I am asking you about.

(Mr. Nizer writes on blackboard.)

We now know that the Viking as you put on the board made a guaranteed offer, guaranteed in its offer how much, $27,500, right?

A. Yes, sir.

Q. Now tell me what Stanley Warner guaranteed.

A. I will have to—

Q. Do you want to look at it?

A. Yes, please.

Q. All right.

A. He further guaranteed that the distributor's share of film rental for the entire engagement shall not be less than $50,000.

Q. Don't read it, just give me the figure.

So the Stanley Theatre guaranteed $50,000?

A. Yes, sir.

Q. There was another offer there. Do you want to look at it?

A. I don't have it. May I see it?

Q. The Studio. And there is one at the Arcadia.

Mr. Sawyer: May I see that? I don't believe

(3701)

we have copies.

A. $30,000 guarantee for the Studio Theatre, sir, on PICNIC.

By Mr. Nizer:

Q. The Studio: How many seats has the Studio?

A. 400, sir. I think we agreed on that.

Q. And the Stanley has—

A. 2900.

Q. And the Viking a thousand, all right.

How much did the Studio guarantee, $30,000?

Give me the next guarantee of the Arcadia.

A. May I have it, please?

Q. Just the guarantee for the moment.

A. $42,500.

Q. Now limiting ourselves for a moment to the guarantees, every guarantee or every offer made in addition to yours was higher than your guarantee, correct?

A. Yes, sir.

Q. And on what you told us yesterday that would indicate that the Stanley had more confidence in this picture than you had, correct?

A. Not only more confidence, sir, on your theory, 900 more seats.

Q. How many more seats?

A. 900 more than the Randolph Theatre.

Q. I am talking about the Viking anyhow. It is 1900 more,

(3702)

isn't it. It is three times as large?

A. Yes, sir, 1900 more than the Viking and 900 more than the Randolph.

Q. And you think, therefore, the seating has something to do with that, do you?

A. I do not. You do. I said on your theory, sir.

Q. Oh, all right. It isn't yours, is it?

A. No, sir, it is not.

Q. Then let's get back to yours.

Did you not tell us yesterday—didn't you tell this Court and jury yesterday that if you have a higher guarantee, that shows that the exhibitor has more condfidence in in the picture?

A. Yes, sir, and terms comparable.

Q. And comparable terms. We are going to come to that.

A. Yes, sir. Right, sir.

Q. So that so far as you could anticipate, exercising your judgment, you didn't have as much confidence in this pictare as Stanley Warner, did you?

A. No, sir. We displayed that, sir.

Q. You displayed it. And the Studio had more confidence than you had in this picture?

A. Yes, sir. They displayed it.

Q. And the Arcadia had $15,000 more confidence?

(3703)

A. Yes, sir.

Q. Didn't it?

A. Yes, sir.

Q. Now, you said yesterday also that if the terms are even comparable then if the guarantee is larger and you

have shown more confidence, that is the one that should get the offer.

A. Definitely.

Q. Definitely. All right, let's see if you want to withdraw this picture PICNIC from your list, then. Let me give you the terms first of the Studio.

Your with this guarantee, 90/10 over $4970.19, right?

A. Yes, sir.

Q. Which means that the first $4970.19 would go to you and after that Columbia would get some money, right?

A. Would get 90 per cent, yes, sir.

Q. And you offered three weeks. That is of some importance, isn't it? You only saw three weeks in this picture as an opportunity, right?

A. Well, let me see my bid, sir. Maybe I had holdover figures.

Q. You did. I am going to come to that.

Three weeks, right?

A. A minimum of three weeks, yes, sir.

Q. A minimum of three weeks with a holdover figure of $17,500.

(3704)

On the second week it would go for another week and at $15,500 it would go for a third week, right?

A. No, sir. The second week—

Q. The second would go to the fourth, wouldn't it?

A. The second would go four and three would go to five.

Q. And after that that was all, there was no further holdover, correct?

A. I assume. I don't have the bid.

Q. Yes.

A. You are right if that is what it says.

Q. So that your maximum—it was a minimum of three and a maximum of five, correct?

A. Yes, sir.

Q. That is yours.

I am just going to take you quickly over the comparable terms. Now let's take the Studio. They certainly offered a little more guarantee than you, and they had the same 90/10, but instead of over $4970 theirs was $2750. In other words, the Studio only takes off the first $2750, not $4900. So that is a little better for the company, isn't it?

A. Yes, sir.

Q. Then they had an indefinite run—let me put this over here—an indefinite run with the holdover for $2750 for Friday and Saturday and Sunday and an involved clause thereafter,

(3705)

but so far as this is concerned I don't think we have to plow through that. I hope, Mr. Wren, we do not unless you want me to.

So would you say—I am not even going to say that the Studio terms are better than the Viking, but would you say they are comparable?

A. Yes, sir.

Q. Now, if they are comparable and there is a higher guarantee, then so far as awarding this picture is concerned you were at least second to the Studio, weren't you, if Columbia used your judgment on this situation? Is that correct?

A. Yes, sir.

Q. Now will you without my going through all of this agree that that is true of the Arcadia?

A. Yes, sir.

Q. Will you agree without my going through it that that is true of the Stanley Theatre?

A. Yes, sir.

Q. So that you were the fourth best in that series of offers, weren't you?

A. Yes, sir.

Q. Do you want to withdraw PICNIC from your illustration?

A. No, sir. Had we been awarded the picture that is what it would have given to us.

(3706)

Q. I know, but you are not—

A. The picture should have been awarded to Stanley Warner's Stanley.

Q. Mr. Wren, perhaps we don't understand each other. The purpose of your demonstration on the blackboard was to show that Columbia should have given you the picture. Now do you agree that you were fourth in line, even if they didn't give—

A. Yes, sir, I agree—

Q. All right.

A. —that three other bids were better than the Viking's bids.

Q. All right, good. Then I think I can cross this out and save a lot of time. I won't take you through the rest.

A. All right, sir.

(3707)

Q. Now, I go to the third. We have saved a good deal on this, sir, in time. Let us go to the third picture, the last one of Columbia that you mentioned. That is SOLID GOLD CADILLAC. Who was in that picture, sir?

A. Judy Holiday, sir.

Q. This was the picture in which Columbia Pictures invited you, solicited you to negotiate; correct?

A. Yes, sir. May I see the solicitation letter, please?

Q. I hope we don't have to go through all that. Your counsel can look at it.

A. Fine.

Q. It will save time—

A. Yes, sir.

Q. —and not hold us up unnecessarily.

And then you replied that you would like to negotiate. Do you recall, without my showing you these documents?

A. I believe you are right, sir.

Q. And then you submitted two alternative offers in this case. Do you recall that, two offers, one or the other? You gave them another, did you not?

A. I believe you are right, yes, sir.

Q. Incidentally, you used one of those alternative offers

(3708)

on the blackboard demonstration: you didn't use the other?

A. I believe you are right about that, sir.

Q. And you will concede, will you not, that the other offer wouldn't have come out with any kind of a surplus in Viking revenue; that is the reason you took the first alternative; right?

A. We took what we thought would be the best offer for Columbia, which they would have taken if they thought it was the best offer, sir.

Q. By hindsight?

A. Yes, sir, by hindsight.

Q. Because when you submitted the two alternatives you didn't think at that time that one was better than the other; you thought they were equally balanced?

A. We gave them a choice, sir.

Q. I know you did. I said, "Alternative." That means choice.

A. Yes, sir.

Q. It was in my question. At the time that you submitted the alternatives you thought they were equally balanced, or you wouldn't submit, certainly, a clear or better one and a worse one, would you?

A. Not necessarily.

Q. Exactly; you at that time thought it was a toss-up

(3709)

between the two, right, when you submitted it?

A. Yes, sir.

Q. Originaliy?

A. Yes, sir. That is right.

Q. Now, I say, when you make your blackboard demonstration, you say you took the better one, the better one being the one that worked out, according to hindsight, a little better for you; right?

A. Yes, sir.

Q. Now, in that case, I am now talking of the SOLID GOLD CADILLAC.

A. Yes, sir.

Q. That is the third Columbia picture, SOLID GOLD CADILLAC, the Stanley Warner-Mastbaum, the Mastbaum Theatre, Stanley Mastbaum, took in at the boxoffice on this picture 55,000—well, I will leave out the rest—$55,000; do you recall that?

A. Four weeks and one day; yes, sir.

Q. Four weeks and one day; that is right. Now, you will agree, won't you, on the assumption that if Columbia had in its honest judgment thought that Viking would gross substantially less than $55,000, you would find no fault with its award to the Mastbaum—that follows, doesn't it?

A. The Mastbaum also put up a $25,000 guarantee, sir.

(3710)

Q. Yes. I know that is true.

A. Right, sir.

Q. Surely. That counts in its favor, doesn't it?

A. Yes, sir.

Q. All right. Now, listen to my question: You will agree, won't you, assuming that Columbia in its honest judgment thought that the Viking would not gross 55, but would gross, let us say, 40, assuming in anticipation—you have to guess—

A. Yes, sir.

Q. —then it certainly would be justified, especially with the guarantee that you pointed out, to give this picture to the Mastbaum?

A. Yes, sir.

Q. Now, did you have any estimate in your mind at the time that you made your offer on SOLID GOLD CADILLAC as to what the Viking would gross with it?

A. Yes, sir.

Q. You did?

A. At the time we made the offer?

Q. Yes.

A. Yes, sir, because I think I have testified that we were told we had to put up a $32,000 guarantee, which I was going to discuss with Mr. Sley, but which I was advised a couple hours later not to discuss with him because the picture had

(3711)

been awarded to the Mastbaum Theatre.

Q. But you first made an offer—what I am asking you before we get to that—because you told us this yesterday and you are eager to say it. Now you have said it. Now, will you answer my question?

A. Yes, sir.

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(3712)

Q. Mr. Wren, you told me a moment ago that you had had estimates of what the Viking Theatre might quote in your judgment—now, this is the kind of a guess, of course, a man has to make—on this picture if you got it. Did you tell me that and is that correct?

A. Oh, undoubtedly. You couldn't figure out a bid unless you did estimate on what it would gross.

Q. Now, what did you estimate the SOLID GOLD CADILLAC would gross box office wise at your Viking Theatre?

A. Well, to be honest, I wouldn't remember, sir.

Q. Did you estimate that it would gross as high as $55,000?

(3713)

Mr. Sawyer: Objected to, Your Honor. The witness has said he cannot remember. That is the end.

The Witness: Probably more, and I will tell you why, sir.

Mr. Sawyer: Don't answer until His Honor rules.

The Witness: Oh, I am sorry.

The Court: Overruled.

By Mr. Nizer:

Q. Go ahead. Now, you wanted to say, "Probably more"?

A. Yes, because of Judy Holiday.

Q. So you thought it would gross more than $55,000?

A. Yes, sir.

Q. How much more?

A. I say, "Probably more"—and I don't know—

Q. Yes?

A. —but because of the fact that this was—

Q. Well, in your mind, how much would you think it would gross? At that time, I mean.

A. Seventy, $75,000, probably.

Q. Didn't you once testify that it was 38 to 40,000 in your opinion?

A. I may have.

Q. Do you want to take back your 75,000 that you said a second ago?

(3714)

Mr. Sawyer: Objected to, Your Honor.

The Witness: Didn't I say I was trying to remember, sir?

If I—

Mr. Sawyer: He said he didn't remember.

The Witness: If I said 38,000, I said 38,000. Then that was probably closer to the time that this is, sir. When did I say this, nineteen fifty—about '47—well, or, '57?

By Mr. Nizer:

Q. Were you asked:

"Q. What did you think the SOLID GOLD CADILLAC—did you think it was going to have a successful engagement?

"I told you I thought it would play three or four weeks.

"Q. Did you have any estimate of its gross at your Viking?

"A. At the Viking?

"Q. Yes.

"A. Yes, 38,000, 40,000, in three or four weeks. That is all."

Did you make that answer?

A. I must have, sir.

(3715)

Q. And when you just said a moment ago, after saying that you didn't remember that you knew it would gross more than 55—you thought it was—that was incorrect, wasn't it?

A. You mean for this 55 now?

Q. That you would go about 55 at the Viking,—

A. Yes, sir.

Q. —up to perhaps 70?

A. Yes, sir.

Q. That was an attempt to accommodate yourself to the case, wasn't it?

A. No, sir. It was not, sir. I told you it was so long ago—now, when did I say that, Mr. Nizer?

Q. This?

A. Yes, sir.

Q. November, 1957, I believe.

A. Yes, sir.

Q. Now, assuming that your frame of mind, which you remembered much better in '57 than today, is correct; namely, that you would have thought it would gross 38 to $40,000, then you certainly wouldn't blame Columbia for thinking that maybe it would gross 38 to $40,000 at the Viking Theatre; that certainly wouldn't be a dishonest judgment, if you had it yourself, would it?

(3716)

A. I don't think I expressed that to Columbia, sir.

Q. I didn't say you expressed it to them. That isn't my question. If you thought that the SOLID GOLD CADILLAC in your estimation, before it played, would gross 38 to $40,000, you certainly don't charge Columbia with being dishonest in its judgment if it thought the Viking would gross 38 to $40,000; you wouldn't charge that if it had that same notion, would you?

A. I don't know what their judgment was, sir.

Q. And if that was their judgment, you wouldn't say that was unreasonable, would you?

A. They are entitled to their judgment the same as we are entitled to ours.

Q. And you wouldn't say it was dishonest or discriminatory judgment, would you?

A. Not on a bid picture; no, sir.

Q. And, therefore, if in their judgment, with a $25,000 guarantee and a 55,000 gross, as now demonstrated, they decided to take a chance on the Mastbaum, which is 4000 seats, you wouldn't criticize that as dishonest conduct, would you?

A. No, sir.

Q. You would consider that reasonable exercise of business judgment, right or wrong; correct?

(3717)

A. Surely, because they had something in writing to compare it with.

Q. All right. Well, then, can we cross—can we cross this one off from your list?

A. If you wish, sir.

Q. Well, you will agree to it, won't you?

A. Yes, sir.

Q. All right.

A. They accepted the best bid.

Q. Thank you. Thank you. Let us take that one off the scoreboard.

Now, that finishes the three Columbia pictures.

Now, I am going to take you to Paramount. In the case of COUNTRY GIRL—we will take that first.

A. Good.

Q. Incidentally, that was a picture with Grace Kelly.

A. William Holden.

Q. William Holden.

A. Bing Crosby.

Q. And that was the picture that we had this Academy Award night and all of that?

A. Right, sir.

Q. There were a number of offers for that picture to Paramount, a number of bids in that case to Paramount; you know that,

(3718)

don't you?

A. Yes. Surely.

Q. Now, let me put them down. If we have to get each document, I will, but I hope that we can save some time.

Paramount now. We will take the first picture you mentioned, COUNTRY GIRL, and I am going to put down the guarantees first.

A. Which guarantees, first or second time, sir?

Q. Well, I will take the last, but if you want the first, I will put those up here.

A. I would like to see it first.

Q. You would like to see both?

A. Yes, please.

Q. All right. You tell me. Viking, what was your guarantee?

A. $60,000.

Q. Guarantee, $60,000. Who got the award of this picture?

A. The Midtown Theatre.

Q. The Midtown, so I will take that next. Did they have a guarantee?

A. Not the first time, sir.

Q. The second time?

A. Yes, sir.

Q. In other words, when you say "first" and "second" so we don't get confused with His Honor and the jury, that means

(3719)

that all the bids were rejected the first time and they had a second go at it? That happens, doesn't it?

A. The first time the Midtown didn't even bid on the picture.

Q. Yes, but the second, it did?

A. So I am told; yes, sir.

Q. The first time all the bids were rejected; Paramount always has the right to do that, if it doesn't like any of the bids; it rejects and starts over again?

A. Yes, sir.

Q. All right. So let us take the second. You again bid $60,000 guarantee, is it?

A. Yes, sir.

Q. What did the Midtown bid?

A. 75, I believe, sir.

Q. That is right. What did the Trans-Lux bid? $75,000. Will you accept that, in order to save time?

A. I believe you are right.

Q. What did they Arcadia guarantee?

Now, of course, we know—I hope that it is clear to His Honor and the jury that the Trans-Lux and the Arcadia are not associated with any of the defendants,—

A. Right, sir.

Q. —either Stanley or Goldman; these are other operators. All right.

(3720)

A. I am not certain of the Arcadia. I think it was—

Q. 60,000.

A. 60?

• • •

(3721)

Q. The Midtown won this picture?

A. Yes, sir.

Q. And the Midtown, starting at least with the guarantee, was higher than yours, wasn't it?

A. Yes, sir.

Q. Obviously; and this showed that the Midtown had more confidence in advance, before this picture was known to be an Academy picture and all the rest—it had more confidence in it than you had by 15,000 front money, as you call it; right?

A. Now we are going to talk about terms.

Q. We certainly will;——

A. Yes, sir.

Q. —which you put so much stress on.

A. Oh, yes.

Q. So if you looked at the guarantee, you were third in line, weren't you? The Midtown, and the Trans-Lux both had a higher guarantee than yours, the Arcadia equalled yours. You were third. You were tied for third place; right?

(3722)

A. Yes, sir.

Q. On guarantee?

A. Yes, sir.

Q. Now, again you tell us that if the terms were comparable, then, of course, the higher guarantees should win?

A. Yes, sir.

Q. Incidentally, in asking you this question now I don't mean to imply that I agree with that.

What was the total gross at the boxoffice? You have it there.

A. $243,778.

Q. And what was the film rental?

A. $151,661.50.

Q. This is film rental?

A. Yes, sir.

Q. I will take it in even figures, 150,000.

A. 151,000.

Q. All right. I will take it even.

A. Oh.

Q. 150,000 even. Now, my point is this: That is what Paramount collected by giving the picture to the Midtown, 151,000 in film rental; right?

A. Yes, sir.

(3723)

Q. Now, to make clear what a guarantee does, the guarantee at the Midtown of 75,000 didn't come into play here at all, did it?

A. Yes, sir; it did. It assured the exhibitor that, come hurricane, he was going to get 75,000. Now—

Q. Yes; and if it were close, if this were the kind of picture that might gross 78 or 80 or 65, that would be important, but if you have a picture that is heralded by Paramount as one of the great productions of the year, based on a play, and if they anticipate by prior experience that they will do well over 125,000 in Philadelphia, no matter who plays it among the larger theatres or the best located theatres, then a guarantee of 75,000 hasn't the same importance, has it?

A. Well, I can't subscribe to that, sir. They had the same feelings about WAR AND PEACE; they had the same feelings about STRATEGIC AIR COMMAND,—

Q. All right; you won't subscribe to it.

A. —and they never came anywhere near that.

Q. In any event, we agree that as things worked out later—

A. As they worked out later; yes, sir.

Q. —the guarantee was meaningless, because once you exceed $75,000, it doesn't cost you anything to have given the guarantee; right?

(3724)

A. No, sir—but you had confidence.

Q. Oh, yes; and it was the Goldman-Midtown Theatre that had the confidence?

A. Well, not according to the answer to interrogatories, I am told, sir.

Q. Well, don't take what you are told; take what you know.

A. Well, he is my counsel, sir.

Q. He is your counsel, but now you use your own judgment on this—that the Goldman-Midtown had $15,000 more confidence?

A. Yes, he had $15,000 more confidence. I will subscribe to that, sir.

Q. Yes; all right; you don't need the help of counsel on that.

Now, let us see, before we get to other terms: You have agreed, have you not, that the prior experience of a distributor with its own pictures at a certain theatre is a very important factor when it considers where it shall award the picture; correct?

A. With Paramount at the Midtown? I certainly will. We will talk about performance, sir. It would be a pleasure.

Q. I don't understand all this comment.

A. You mentioned prior performance, sir, and I would like to discuss prior performance of Paramount at the Midtown Theatre.

(3725)

Q. Now, as your counsel says, let us leave the—what was it, the outraged and the anguished out of it. My simple question—

A. This is no outrage and no anguish.

Q. All right; all right; I am just jesting for a moment. My simple question is: Have you not testified and wouldn't you do so again, if I asked you, that the prior performance of a company at a particular theatre with its own picture is an important factor when it sits down and weighs the differences between bids or offers?

A. Yes, sir.

Q. And Paramount at this time had had no prior experience at the Viking Theatre, did it?

A. No, sir.

Q. And when you made a guarantee of $60,000, was that to indicate your estimate in a general way of what you thought the film rental would be?

A. I would assume it was. As you know, it was not my estimate. Mr. Sley made the—

Q. Yes; but, I mean, that is what a guarantee—

A. Yes. I would assume so; yes, sir.

(3726)

Q. So that Paramount would have the right, not having ever dealt with the Viking Theatre at this point—would have the right to think that when the Viking guaranteed $60,000, it meant that that is how the Viking appraised the potential film rental of this picture; isn't that so?

A. Yes.

Q. Now, the Midtown Theatre, which was awarded this picture, played the picture between February 1 and May 17—I don't have to write that down. Between February 1 and May, 1955.

A. You are right, sir.

Q. And did you not advise Paramount in the first instance that you would not be able to play this picture between February 9 and 15, which was what Paramount wanted on account of that academy award matter?

A. I believe the first time it wasn't any date, sir. I think subsequently they said it had to open the 9th, if I remember correctly.

Q. When the word came through from California that there was going to be a nomination of that picture, they insisted upon February 9 to 15?

A. February 9.

Q. The 9th?

A. That is right.

(3727)

Q. And you advised—by "you" I mean, not you, the Viking.

A. I understand.

Q. The Viking advised that they couldn't supply that date, right? Do you recall that?

A. I am trying to remember whether they did or not, sir.

May I see that?

Mr. Sawyer: Well, Your Honor, he was not there.

Mr. Nizer: He knows the records.

Mr. Sawyer: Your Honor, when it comes to the records—

Mr. Nizer: All right, let us save five minutes.

Mr. Sawyer: Mr. Sley knows that.

Mr. Nizer: Let us assume. Let us save some time. We will get it some other time. I am not going to stop for it.

By Mr. Nizer:

Q. Assuming that the Viking advised Paramount that, for whatever reason it could not play this picture during that academy night week that they wanted to tie it in with, do

(3728)

you think that it was reasonable of Paramount to take that into consideration as one of the factors?

A. Assuming.

Q. Yes, assuming.

A. Yes, sir.

Q. All right. Now, the Viking bid—we are now coming, you said you wanted to see the terms. Right?

A. Yes, please.

Q. All right. Let me, without writing it all out, giving you a letter, see if we can agree quickly. The Viking bid was for ten weeks with a hold-over the 9th week, of $75[illegible]. Will you accept that, sir?

A. Yes, sir.

Q. And the Midtown, instead of ten weeks, was an indefinite run. You will accept that.

A. Yes, sir.

Q. Now, which is better as between those two terms, the Viking's or the Midtown's, for the distributor?

A. Well, depending upon what the length of the indefinite run is, sir If it is termination for the distributor then it is better for the distributor, because he can get out after the first week with the $75,000. But if it is an indefinite run, just indefinite run it doesn't mean anything, because then it would have to be mutually agreed

(3729)

on as to who should take the picture off.

Q. Isn't it, and haven't you in fact testified, indefinite run means the distributor has the right to take it off, but the exhibitor hasn't that right; haven't you so testified?

A. I think I said that with reference to indefin' run termination with discretion to distributor.

Q. No, no. Of course, if it says discretion you don't have to interpret it. Haven't you interpreted—or I will ask you now, without reference to testimony for a moment: Isn't your knowledge of the industry that the word "indefinite run" means that the distributor may determine how long it shall run at that theatre depending upon how it makes receipts?

A. I think there is disagreement on it, sir, and I think that is the reason they had to add the other, the balance of the sentence.

Q. But you have understood it to mean that, haven't you?

A. Yes and no.

Q. Yes and no?

A. Yes.

Q. All right, I will take that answer.

Now, of those terms which I have just given you—I think I ought to have the percentages too.

(3730)

I have them. Hold-over.

A. You gave me $7500 hold-over and it is 90/10 over $4900 a week.

Q. All right. Then the Midtown, have you got that?

A. No, sir.

What is the Midtown?

Q. I will give it to you in a second.

Mr. Rome: 90/10 over $5000.

Mr. Nizer: 90/10 over $5000. Anything else, Mr. Rome, you can supply us?

All right.

By Mr. Nizer:

Q. Now, as between those two proposals would you say, without saying one is clearly better than the other, that they are comparable? Aren't they?

A. Yes, sir.

Q. Now, if those two offers, the Viking's and the Midtown's are comparable, and the Midtown has a higher guarantee, you will agree, will you not, that the award should have been made to the Midtown? Won't you?

A. No, sir. No, there is a matter of ten weeks, sir.

Q. Didn't you tell me yesterday—

Mr. Nizer: May I have that testimony, please, Mr. Smith?

(A volume was handed to Mr. Nizer.)

(3731)

By Mr. Nizer:

Q. Didn't you tell me yesterday at page 3625 this; I asked you:

> Q. Now, do you think that a picture that has brought in, as you are now demonstrating, $150,000, that a $60,000 guarantee is significant under those circumstances? Do you?
>
> A. Yes, sir.
>
> Q. All right; and suppose that somebody else had offered $75,000 guarantee (I was talking in my mind of that very case, you see) would you say that that, being as it turned out, one-half, that that should automatically result in the bid nonetheless against you?

And you said:

> Comparable terms. He had $15,000 more confidence in the picture than I did; yes, sir.

And you were thinking of this case ahead, weren't you?

A. No, sir, not especially.

Q. All right. Now, didn't you therefore mean by that and haven't you told me that this morning, if the guarantee is higher and the terms are comparable the award should go to the fellow who gives the higher guarantee?

A. But the part of the terms—

Q. Now, wait, just answer the question, not "but."

(3732)

A. Yes, sir.

Q. Don't start with "but." What is the answer to my question?

A. Yes, sir, with an explanation.

Q. What is the explanation?

A. Part of the terms are playing time, sir.

Q. Well, I asked you, I told you the playing time, and you said they were comparable. I told you Viking ten weeks with a holdover and the Midtown an indefinite run. I have given you all of that and you said they were comparable. Didn't you?

A. That is right, sir.

Q. All right.

A. Now, the ten weeks—

Q. Since they are comparable—maybe we can save some time on this—since they are comparable and the Goldman's Midtown guarantee is higher shouldn't under your judgment and discretion the Paramount give the award to the Midtown?

A. No. Now we are down, sir, where the guarantee is better in the case of the Midtown. Now we have ten weeks of expenses to put on top of the Viking guarantee, because he is guaranteeing that he will keep the house open for that particular picture for ten weeks, and as a result he has ten weeks' expense, as opposed to an indefinite run where there is no commitment expense-wise.

Q. But after we were all through with all of that, and we

(3733)

know that, you told me a few moments ago, didn't you, that you considered these offers, these two bids, comparable.

A. I did, sir, and I have explained how I considered them comparable. Guarantee-wise it was better.

Q. What is that? What was the last phrase?

A. Guarantee-wise—

Q. Hold it one second. Let me hear it.

A. Guarantee-wise.

Mr. Nizer: Just a minute.

What was the last answer?

(The record was repeated by the reporter as follows:

"A. I did, sir, and I have explained how I considered them comparable. Guarantee-wise it was better.")

By Mr. Nizer:

Q. Now there is no doubt of that.

Now I ask you, and listen to my question.

Didn't you also tell me after I have you all the terms, that they were comparable, those terms?

A. Percentage-wise, yes, sir.

Q. No, I didn't limit you to percentage. I read to you the weeks, I read to you the percentage, I read to you the 90/10 over house figures, I gave you the house figures, and after that was all through, didn't you say they were comparable? Didn't

(3734)

you now?

A. Yes, sir.

Q. All right.

A. Yes, sir, but you didn't mention the ten weeks' playing time as opposed to the indefinite run.

Q. Yes, I did, I did.

Suppose you assume for a moment that prior to your answer, because it is so, and I don't want to read it all back, that I first gave you the ten weeks with a holdover for the ninth week, I mentioned that. I then said the indefinite run, we had discussion, I gave you the terms. And after that I said: Are they comparable, these two sets of terms or offers, and you said, yes.

A. Yes, sir, I did say that.

Q. Now, I ask you, if the terms are comparable, and the Midtown guarantee is higher under your theory, should not the Paramount have awarded this to the Midtown on that basis only?

A. Which basis only?

Q. That they are comparable terms and a higher guarantee, by the Midtown.

A. On guarantee—

Q. On that assumption.

A. On guarantee I will agree, on percentage I will agree, on playing time I will not, because the Viking was obligated to

(3735)

play a minimum of ten weeks as opposed to his obliged to play nothing.

Q. Mr. Wren, is playing time one of the terms of a bid?

A. Yes, sir.

Q. And when I read the terms of this bid did I include playing time?

A. I believe you did, sir.

Q. And after I had included playing time didn't you say they were comparable?

A. I believe you are right, sir, but I spoke too fast on the indefinite run and ten weeks.

Q. Oh, you mean you spoke too fast?

A. I certainly did on that one, sir.

Q. Oh, well, now that is a different thing. You mean you want to take back your answer?

A. Only in so far as indefinite run and a commitment to a number of weeks. The exhibitor on an indefinite run is not obligated in the same manner as an exhibitor is on a given number of weeks.

Q. How many weeks did the Midtown actually play this picture?

A. Fifteen.

Q. Fifteen?

A. Yes, sir.

Q. And you had a minimum of ten, didn't you?

A. Yes, sir.

(3736)

Q. And isn't it a fact that an indefinite run in any contract, no matter how you interpret it, is a better clause than a specific ten-week proposal, because the distributor has some leeway with that run, depending on how the picture goes?

A. But, by the same token, so does the exhibitor have leeway.

Q. Well, then, with the exception—let me do this. With the exception of this taking back of your testimony on the difference between the runs—

A. Yes, sir.

Q. —you would agree that Paramount reasonably should have awarded this picture to the Midtown on these two bids, with that one exception, the ten weeks as against an indefinite run?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. All right. That is the only thing that stands in the way?

A. Yes, sir.

Q. Does it?

A. Yes, sir.

Q. Now, let us suppose that Paramount in its judgment, even

(3737)

though you may disagree with it now, according to this change—in its judgment thought that the indefinite run was better than ten weeks. Just let us assume that. That is not an impossible assumption, is it? Lots of people think so, don't they, in this industry?

A. Oh, yes.

Q. All right. Therefore, if lots of people think so, let us assume that Paramount thought so, even if you disagree. Would you say that if it thought so, and then acted in accordance with that notion, that that was an honest exercise of judgment in granting the award to the Midtown then?

A. No, sir, because they had no performance to make such a decision, sir.

Q. They had no performance at your theatre, did they?

A. They had none at all at the Midtown to be proud of, sir.

Q. Mr. Wren, let us not drag performances in, because you had none, either, sir.

A. You mentioned it, sir.

Q. I didn't in this case. Listen to my question. We are only delaying ourselves. I shall insist upon an answer to my question, if you don't mind. You say that with the exception of the difference between a minimum of ten weeks with a hold-over and an indefinite run, do you agree that Paramount was right on all the other terms and on the higher

(3738)

guarantee in giving the award to the Goldman's Midtown instead of the Viking?

A. Yes, sir.

Q. Now I ask you: Suppose that Paramount thought, as you have said lots of people do, that an indefinite run is better than 10 weeks with a hold-over; suppose they

thought so, right or wrong. They could be wrong, let us assume they honestly thought so, right?

A. Yes, sir.

Q. Do you follow me?

A. I will assume.

Q. Now, on that assumption, which you say lots of people in the industry do make, would you say that if they then awarded the picture to the Goldman's Midtown instead of the Viking, all other terms being comparable, and the Midtown having given a larger guarantee, that that was an honest exercise of judgment, right or wrong; you would say that, wouldn't you?

A. With reservations.

Q. And before we come to the reservations, you certainly wouldn't say that that was a dishonest judgment on the part of Paramount under the circumstances, would you?

A. With reservations.

Q. Now, a minute ago, when I asked you whether you would

(3739)

consider that Paramount had under those assumptions—withdrawn.

I must review it, please, to be clear.

A. Yes, sir.

Q. You agree that the Goldman's Midtown offer on everything but this difference in terms, as you put it, is comparable with the Viking, right?

A. Yes, sir.

Q. You also agree that the Midtown's guarantee is superior to the Viking's?

A. Yes, sir.

Q. You therefore say that with the one exception of the distinction between ten weeks' minimum and indefinite run, it would have been right in your own judgment for the Paramount to award the picture to the Goldman's Midtown, correct?

A. If they had something to compare with—

Q. No, without—

A. —past performance.

Q. On your theory of better terms plus better guarantee.

A. Yes, sir, I will agree to that, sir.

Q. All right, let us not go off on something else now. I am trying to finish this if you will just answer one way or the other.

(3740)

Then I asked you next: Suppose that Paramount thought, as you say many people do, that the Midtown's indefinite run was a better offer on playing time than ten weeks with a hold-over—suppose they thought so honestly in their judgment, even though you disagree with that—would you not then say that if you take that assumption and add it to the other, the comparable terms and the better guarantee, it should have awarded the picture to the Goldman's Midtown? You would, wouldn't you, on that assumption?

A. If they had all this before them, yes, sir.

• • •

(3741)

Q. Now, COUNTRY GIRL, which is the picture we are talking about, had a national film rental of six million, correct?

A. Yes, sir.

• • •

Q. NOT AS A STRANGER, that picture that you played, had a

(3742)

national film rental of what, as it turns out?

A. Six million one I believe it was, sir.

• • •

(3744)

Q. Now, this is the Midtown Theatre, which you say is comparable to the Viking Theatre. They both have approximately 1000 seats. Right?

A. They both have 1000 seats.

Q. Right. Now, then, you compared various figures of the Viking, taking it on the gross of the COUNTRY GIRL. That is how you did this again. You assumed that the Viking would

(3745)

have had the gross of COUNTRY GIRL, didn't you, in making your and Mr. Sawyer's demonstration; is that right?

A. With reference to THE CAINE MUTINY, yes, sir.

Q. Now, with reference to COUNTRY GIRL.

A. Oh, yes, I understand what you mean.

Q. Right.

A. I see what you mean, yes.

Q. Now, you had in your own theatre an experience of a picture that was exactly the same so far as hindsight can go as COUNTRY GIRL. They both had $6,000,000 national film rentals. You couldn't get them closer, could you?

A. No, sir.

(3746)

Q. So that you had an illustration in your own theatre, in your own experience, which you could have compared to determine how you would come out on film rental. You had that at your theatre, didn't you?

A. NOT AS A STRANGER?

Q. Yes.

A. Yes, sir.

Q. Now I am going to read them off fast. Give me the figures first for COUNTRY GIRL that you took and assumed and these that you ignored.

A. $33,000.

Do you want round figures?

Q. Yes.

A. 33,000.

$28.000.

Q. I will tell you what we will do to save time. Give me the total.

A. $243,000.

Q. For how many weeks?

A. 15 weeks.

Q. What is the total of NOT AS A STRANGER?

A. $166,000.

Q. For how many weeks, 11?

A. 12.

(3747)

Q. 12 weeks. So that although you had an experience at your own theatre with a picture that was identical, as close as you can get on national film rental, you didn't use NOT AS A STRANGER to determine what the Viking would have made, grossed or paid film rental; you assumed again, as you did in all your other situations, that you would have grossed the $243,000 and you ignored the $166,000, whether adjusted to 15 weeks or otherwise, didn't you?

A. Where is the assumption wrong? We have the same number of seats. That has been your theory. The other thing was ridiculous we assumed and fallacious because they had more seats than we had. Now we have the same number of seats and you say it is fallacious.

Q. No. Would that indicate that location had something to do with the grossing?

A. Not a bit, sir.

Q. Not a bit?

A. No, sir. And I will indicate why, sir.

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(3748)

The Witness: The very next picture into the Midtown Theatre, the man was committed to play it six weeks. He took it off in nine days. In nine days he grossed $10,773. The same location, same thousand seats, same theatre.

By Mr. Nizer:

Q. The next picture was what, Mr. Wren?

A. ROMEO AND JULIET at the Midtown Theatre following COUNTRY GIRL.

Q. How much is the national film rental of ROMEO AND JULIET that you just got so passionate about—withdrawn.

A. No, that is neither here nor there. It is the same location, the same theatre and the same street.

Q. $294,000 to $6,000,000. Does anybody suggest here, Mr. Wren, that the picture has nothing to do with the result? Did you ever hear us claim that? Is there any doubt that if you have a $294,000 lemon, so to speak, that it will not do as well as a $6,000,000? Is there any doubt of that between us?

(3749)

A. This is the first I have heard you mention "lemon," sir.

Q. Well, all right. Is that pertinent? Will you answer my question?

A. I wouldn't expect ROMEO AND JULIET to do what COUNTRY GIRL did, no sir. But I wanted to illustrate a point with regard to location.

Q. Well, now, I will spend just one more minute on that.

We both agree, do we not, that the quality and attractiveness of the picture is a vital if not the most vital consideration no matter where it plays?

A. Absolutely.

Q. We both agree on that?

A. Positively.

Q. Now, the only question we differ on—and I will not go back to it—is that given the same quality of a picture—that is what you were doing, you were taking the same picture COUNTRY GIRL that you said you should have had—

A. Yes, sir.

Q. —given the same quality of picture, you tell me that location and size of the theatre have nothing to do with the result?

A. Not one iota.

Q. All right. Now, that is where we are.

(3750)

Now, if you had taken the Viking's own experience on a picture of the same boxoffice quality according to your standard of national film rental, namely, NOT AS A STRANGER, if you had taken that and applied the same figures which you applied to the gross of the Midtown, will you subject to your check—and I will give you these figures again at the lunch hour—will you concede, subject to this check, that the Viking would have aid a film rental for COUNTRY GIRL had it gotten it of $96,000 instead of $151,000 which the Midtown paid?

In other words, assuming that you would have done as your own theatre previously showed you did on a similar national film rental picture, you would have paid at your theatre some $60,000 or $50,000 less film rental than the Midtown. Subject to check, will you accept that?

A. No, sir, I will not accept that. You are comparing oranges and apples here again. Here you have an Academy Award picture, which you indicated, you talked about nomi-

nations affecting this thing vitally. They had to get it open. And those nominations poured in, nothing but interest in the picture and a will to see and want to see all the way up to the first week in April, which you indicated here on the blackboard. And now you are telling me that—NOT AS A STRANGER never got an award for anything.

(3751)

Q. Now, then, if you had played this picture not as you said you would—withdrawn.

I think we did get this far with you, though we left some of it to Mr. Sley, that you would not have played COUNTRY GIRL during the nomination award week because you were tied up. Do you remember you conceded that?

A. Let's concede that we did play it. We are trying to compare oranges and apples here.

Q. No, Mr. Wren,—

A. I want to compare apples.

Q. Mr. Wren, let's leave fruit out of this for one minute.

A. All right, sir.

• • •

(3752)

Q. The next picture you put on the board I believe was the Paramount picture THE COURT JESTER. Who was in COURT JESTER?

A. Danny Kaye. Right, sir?

Q. Now, the Viking bid how many weeks for this picture?

A. I would have to see the bid, sir. I don't recall.

Mr. Nizer: May I have 108?

By Mr. Nizer:

Q. Suppose I tell you—and we can save a moment—you bid two weeks with a hold-over to be mutually agreed upon. Will you accept that?

A. Yes, sir.

Q. With a 90/10 over your $5000?

(3753)

A. Yes, sir.

Q. And with overtime added on so that there would be about $5,057 that would come back to you before a single cent came to Paramount when it considered your bid. Is that right?

A. If that is what it reads, yes, sir.

Q. And you gave no guarantee, is that right?

A. Apparently not, no, sir.

Q. The Midtown instead of bidding two weeks bid four weeks. You accept that, won't you, subject to your counsel having it there? And you in making your blackboard computation, Mr. Wren, equated those two situations. You took the gross at the Midtown, which was some $16,000—no, I beg your pardon. You took $23,810 of the Midtown instead of the first two weeks of $16,865, isn't that a fact, when you made your calculation?

Mr. Sawyer: You better look at the thing, Mr. Wren, before you answer that.

By Mr. Nizer:

Q. All right, look at it.

A. I would like to have the question again, please.

May I have the question, please?

Q. I will withdraw it. I think we can save time.

I will look at your sheet and see if this isn't correct as to what you did on the blackboard at Mr. Sawyer's invitation.

(3754)

You took the four weeks' gross at the Midtown Theatre of some $46,000?

A. Yes, sir.

Q. That is what you put on the board originally for Mr. Sawyer?

A. Yes, sir.

Q. Then you applied your terms to that $46,000 in order to reach what you say the Viking would have paid as film rental, which was $23,000.

A. Yes, sir.

Q. So that you, even though your bid was for two weeks, applied—

Mr. Sawyer: With a holdover.

By Mr. Nizer:

Q. With a holdover—applied your terms for a four-week gross, didn't you, in that computation?

A. Yes, sir, yes, sir.

Q. Now, in addition to that, in your computation you did not take into consideration the advertising clause of both bids, did you? You just ignored it. You didn't deduct, as you did in other cases for advertising, right?

A. Probably because it wasn't available.

Q. Well, it was available from the same sources from which

(3755)

you had obtained the advertising on some other picture.

A. No, sir. Some of these we indicated the advertising was not available, sir. We indicated that.

Mr. Sawyer: There were a few, Mr. Nizer, on which we didn't have the things with us and we wanted an opportunity to check. There are a few. We so indicated.

By Mr. Nizer:

Q. Until we demonstrate to you that it was available, let's leave that aside and let's get to the essence of the matter.

A. All right, sir.

Q. You will agree that it was correct, it would be correct before you reach any conclusion, to apply the adver-

tising expenditures on these two or you can't compare them. It is a figure which is important, isn't it?

A. Yes, sir.

Q. All right, now, let's do that, and see if you don't want to withdraw that picture from your grievance or your comparison.

We are still on Paramount but this is the COURT JESTER.

(Mr. Nizer writes on blackboard.)

In the Midtown deal,—the Midtown played that picture, right?

(3756)

A. Yes, sir.

Q. Now, you assume, subject to our demonstration from the records—just assume it—that the Midtown was reimbursed the $5,308.23—

Mr. Sawyer: What figure is that, Mr. Nizer? I am sorry.

Mr. Nizer, will you tell me what—

Mr. Nizer: Pardon?

Mr. Sawyer: Could you tell me what that figure was?

Mr. Nizer: That was the advertising figure of the Midtown deal, which was subtracted from the $15,000, the film rental—

By Mr. Nizer:

Q. Read it off to me.

A. $15,832.02.

Q. Again let's take round figures. $15,000. And let's make this round figures.

A. $15,800.

Q. $15,000 was what the Midtown paid on film rental, right, to Paramount?

A. Yes, sir.

Q. Now, I am supplying the figure that you say was not available. Assume for the moment that it is. We will show it to

(3757)

you and Mr. Sawyer, that they paid $5,300, which Paramount did toward the advertising, which means in round figures that the net film rental paid to Paramount—do you follow me?

A. No. You have $53,000 up there, sir.

Q. Oh, that is wrong, of course. That is ten-five.

A. Yes, sir.

Q. So that instead of a film rental of 15-8, if you really apply the advertising it is 10-5. That is correct, isn't it?

A. Yes, sir.

Q. Now, if I applied to the Viking Theatre, which you did—now I am going to assume all the rest. I am not quarreling with the rest of it for this purpose. I am going to assume that you would have done what the Midtown did. That is the way you did it.

A. The same type of advertising, yes, sir.

Q. Yes. I am assuming that, exactly the same.

So here is the Viking. I am going to take all your figures except I am going to apply the advertising to it.

A. Sure.

Q. So that if you put down under your clause—$9,876.30 is the exact amount but I will just take it as $9,800.

First I will get the film rental. What is the film rental as you figured it out on your assumption?

A. $23,800.

(3758)

Q. Twenty three eight?

A. Yes, sir.

Q. Now, under your clause the distributor was to pay 10 per cent of the advertising?

A. Yes, sir.

Q. And also those extra billboard clauses, which comes to roughly 8000. We will take it in round numbers, correct?

A. We assumed it was going to be the same advertising as the Midtown Theatre, sir.

Q. No, I am applying your terms. Aren't you applying—

A. Oh, all right, sir, all right. Do you want to add that and make it $6300?

Q. That makes $9,800 in round figures. I will give you the breakdown in a minute.

A. Pardon me. $9,800 for what, sir?

Q. Wait a minute. Your film rental under your computation was sixteen—you gave me the wrong figure.

A. No, sir.

Q. Sixteen-six?

A. No, twenty-three eight, sir.

Mr. Sawyer: $23,800.

A. $23,800, right. Here it is, sir.

By Mr. Nizer:

Q. Oh, oh, I adjusted it for two weeks. Just assume for the
(3759)
moment—that's right.

Mr. Sawyer: Oh, well.

By Mr. Nizer:

Q. I made an adjustment which I didn't tell you about.

A. That is the first Paramount adjustment we ever got.

Q. Good. There you are. Now,—

Mr. Sawyer: I object to this, Your Honor. He arbitrarily cuts the playing time in half.

I mean, is that what you are doing? Are you proceeding on that basis?

Mr. Nizer: I am not doing anything of the kind, Mr. Sawyer. I am applying the terms of the deal.

Mr. Sawyer: No, you are not, Mr. Nizer.

Mr. Nizer: He bid—well, then, you examine on redirect if you wish.

Mr. Sawyer: He has a hold-over provision, two weeks plus a hold-over.

Mr. Nizer: Yes.

Mr. Sawyer: Well, then, let's have the whole deal.

By Mr. Nizer:

Q. Let's have the whole deal first this way on the figure of your bid of a minimum of two weeks.

Let me show you your clause. It reads minimum

(3760)

of two weeks with a possible hold-over to be mutually agreed upon. That is pretty indefinite, isn't it, a possible hold-over if you and Paramount agree? There is no commitment for a hold-over either on your part or Paramount's, is there, under your bid?

A. No, sir.

Q. All right. Now, therefore, assume with me that I take that to mean two weeks definitely, a real commitment of two weeks, and adjusting the film rental to that extent I get sixteen eight in round figures. Then I am going to take off their advertising, which is nine eight in round figures. I will give it to you to the dollar. And that leaves in round figures $6,900 net film rental paid by Viking to Paramount as contrasted with—

A. Excuse me, sir.

Q. Just a moment.

A. Where does the $9800 advertising come from?

Q. $7,934, which is the amount of the total advertising, plus—

A. You only added fifty nine.

Mr. Sawyer: That is the four-week advertising. Now, do you want to have four weeks one way and two weeks the other?

(3761)

Mr. Nizer: No, I think I have adjusted it. If I haven't, I will adjust it any way you want.

* * *

Q. Under these circumstances, even if you adjust a couple of thousand dollars—to cut it short, one way or the other on your demonstration, taking all of your assumptions but taking my assumption that you had a commitment for two weeks with a possible hold-over to be mutually agreed upon and that you have nevertheless compared four weeks' receipts with two weeks' of returns, and putting in the advertising which you say was not available, then your film rental would have been less. Never mind whether it is $3100 less or $1000 less or $500 less. Your film rental to Paramount would have been less than that which it was paid?

A. I don't understand that, sir. I frankly don't.

Q. All right.

A. Why is it $5300 advertising for the Midtown and $9800

(3762)

for the Viking?

Q. Because your clause required 100 per cent payment of advertising, didn't it?

A. Yes, sir.

Q. And the Midtown clause was a cooperation in which they paid 50 per cent. Doesn't that explain it.

A. No, sir, because 50 per cent would be 10-6 instead of 9-8.

Q. According to the scale. It wasn't exactly 50. So it is 46. For this purpose isn't that the answer?

A. What was the total amount of the advertising? That would be the answer, sir.

Q. I gave it to you, sir. I gave it to you.

A. No, you did not.

Q. Well, sir, let me ask you this without figures. If your bid requires 100 per cent payment of advertising by Paramount and the Midtown bid requires less than 100 per cent payment by Paramount, that is a factor—listen to me.

A. Yes, sir, I am listening.

Q. —that is a factor that Paramount has a right to consider in awarding the bid, hasn't it?

A. But in the first place the Midtown did not bid.

Q. No. Will you answer my question?

(3763)

A. So there is nothing to consider advertisingwise.

Q. Will you please tell me whether on the statement I made Paramount would be justified in considering that one of the terms which you said was not available to you when you made the calculation? It would be justified in considering that fact, wouldn't it, among other terms you submitted?

A. If there were bids, yes, sir, but there were not bids? Only the Viking bid. The Midtown did not bid for the picture.

Q. Now, you said you don't know where I get the 98 from?

A. No, sir.

Q. I show you the answer—

Your counsel in this case asked Paramount to admit the following: The picture played at the Midtown from February 3 to Mar 1, '56, with a preview on a certain date and you received a film rental of $15,834 which included an adjustment of $1,258. You paid back $4000—take

that figure—you paid back $4,901.57 to William Goldman Theatres, Inc. as your share, Paramount's share, of the advertising expenditure.

Now double $4,901.

A. Now, wait a minute. But you have $5300 up here, sir.

(3764)

Q. No, no; please take—

A. Yes, sir.

Q. Please follow me. Multiply 4901. What is it? 98?

A. Why, sir, that covers four weeks and you are asking me to do it in two weeks.

Q. Will you just answer my question.

A. I know two times 49 makes 98; yes, sir.

Q. And look at the figure—

A. I understand that.

Q. And look at the figure there. What is it?

A. Yes, sir; but it is four weeks on advertising against a two-week engagement.

Q. Now, I won't quarrel with you about that for this purpose, because I don't want to get into a 15-minute mathematical computation. I ask you this to cut through it. Whether you adjust that downwards or upwards, it won't —$9800 worth of advertising isn't going to differentiate between the ten thousand five and the 6900 enough to wipe it out, will it?

A. It may. I would like to see the complete ad campaign, yes, sir, for four weeks. I don't know what he did on the third week. He might have spent $2000 for advertising on the third week.

* * *

(3765)

Q. Here, incidentally, are the two figures that make up 70 for the first two weeks. You want it for two weeks? I will give it to you. $7538.05—take that—and $396.62. How much is that?

A. $7934.67.

Q. All right. Let us put down 79 instead of 98 here—that is what you are telling me to do and I will do it just to cut through this—79 in round figures. So now we have, let us say, $9000, and Midtown paid $10,000, didn't it?

A. The Midtown, sir, paid $10,000, according to this, but the Midtown did not bid, so there was nothing to compare.

Mr. Nizer: I move to strike out whether the Midtown bid or not, Your Honor, as not responsive.

The Witness: You have said he bid, sir.

(3766)

The Court: Now, now, now, Mr. Wren. That was twice you said that, and it was voluntary. It had nothing to do—

The Witness: All right, sir. I am sorry.

The Court: —with the answer to that question.

There, regardless of whether they bid or not, he is trying to show you that the Midtown paid a certain rental—

The Witness: Yes, sir.

The Court: —and that he compares it to another rental.

Mr. Sawyer: And I say, Your Honor, that—

Mr. Nizer: Now—

Mr. Sawyer: —with the understanding—to correct Your Honor—that this was all on the assumption that the engagement was cut in half and it was two weeks.

The Court: Surely.

Mr. Sawyer: Yes, sir.

By Mr. Nizer:

Q. Now, in addition to—

Mr. Nizer: I do not accept that, that the engagement was cut in half; it was a two-week commitment against a four week, and they should not have been equated, and I gave my assumption on that basis. I will leave it to

(3767)

the Court and jury.

By Mr. Nizer:

Q. Now, the prior experience which Paramount had before the COURT JESTER with the Viking was the picture LUCY GALLANT about which we have heard plenty in this case; right?

A. Yes, sir.

Q. And that was a picture which Paramount played at the Viking and, as you have already told us, Paramount lost money, about $3000; haven't you so testified? And the terms of LUCY GALLANT and the terms that you offered for COURT JESTER were very similar, weren't they?

A. Yes, sir.

• • •

(3776)

Q. There were other offers, weren't there?

A. I would assume there were; yes, sir.

Q. One by Stanley for the Mastbaum Theatre on the COURT JESTER, that same picture; isn't that so?

A. I will accept that; yes, sir.

(3777)

Q. And there was one by the Arcadia; do you know that?

A. No; I do not.

Mr. Nizer: Give me 110, please.

The Witness: May I see both of them, please?

Mr. Nizer: What?

The Witness: May I see the Mastbaum, too, please?

By Mr. Nizer:

Q. Here is the Mastbaum and here is the Arcadia. Have you seen them, sir?

A. Yes, sir.

Q. Now, I wonder if we can do the same thing we did this morning, without my making computations on the board, which takes so much time. You can look at that for a while.

Would you accept, subject to you and your counsel checking after court hours, the fact that if you applied the Arcadia offer on your theory of taking the receipts at another theater and assuming that it would have had it, that the Arcadia would have paid—I will give you the amount, subject to check—some roughly $7500 more film rental than the Viking would have paid on your computation?

A. No, sir.

Q. Will you accept that subject to check?

A. No, sir; I will not, because the Viking's bid was due on December 8, 1955, and these bids are dated December 13, 1955,

(3778)

from both the Stanley Warner-Stanley and Mastbaum and the Arcadia Theatre.

Q. Now, forgetting the dates—

A. I cannot forget the dates, sir. They come in a week after mine.

Q. We are not going into the question of dates at this time, because you didn't even try to negotiate thereafter, and all bids—

A. This is bidding, sir.

Q. —and all bids—

A. This is not negotiating.

• • •

(3779)

Q. I am asking you, forgetting any date, looking at the offer of the Arcadia and taking your method of computation—namely, that you assume that the Arcadia would have grossed what the Midtown grossed on that picture, and applying its film rentals the way you did for the Viking, applying the Arcadia film rental—on those assumptions, Mr. Wren—follow me, now—on those assumptions, would you accept, subject to check, the fact that the Arcadia would have paid a higher film rental on that type of computation than the Viking would have under its bid, under its terms? Will you accept that subject to check?

A. Only based on the fact that it is an accepted fact that this bid was a week after mine was—

Q. Yes.

A. —supposed to be due at 5:00 p.m.

Q. I am not accepting it as a fact or rejecting it. Forgetting dates, the terms of that offer is what I am asking you about, so please do not take us off on another subject which may be the subject of other cross-examination at some other time. We are limited to these blackboard demonstrations.

(3780)

Will you accept that on those assumptions which I have just made that you followed the same method for the Arcadia as you followed for the Viking—will you, subject to check, accept that fact, that they would have paid a larger film rental than you?

A. I don't think so, sir. I would have to check this. It is a 70/10 deal. It is not a 90/10 deal.

(3781)

Mr. Nizer: I do not think I will undertake it.

By Mr. Nizer:

Q. Will you accept the same proposition for the offer that you had before you—withdrawn.

Now, before this picture, THE COURT JESTER, was awarded to the Midtown you know that the Midtown had played the COUNTRY GIRL for Paramount, one of its prior pictures, and had an experience of $151,000 film rental; correct?

A. Film rental is correct. The play dates—that is right, sir. It is almost a year later.

Q. And would you therefore admit that Paramount was justified, as one of the factors in considering whom to award this picture to, under negotiation or bid, either way, in considering the fact that it had had in its own experience at that theatre, an outstanding picture, it is true, a very large film rental of $151,000, whereas from its own experience, on a much poorer picture, it is true, at your theatre it had lost $3,000; would you think that that is at least a factor which a distributor can at least take into consideration?

A. No, sir.

Q. Hadn't you testified, sir, that the prior experience of

(3782)

a theatre playing the same company's picture is something which the distributor should and has a right to take into consideration?

A. Yes, sir, but it does not apply in this instance, sir.

Mr. Nizer: What page?

Mr. Sawyer: He said he did, sir.

The Witness: I agree to that, but I except for this instance.

By Mr. Nizer:

Q. This is the one exception, is it?

A. Yes, sir, this is an exception.

Q. Now, at page 2084 I asked you about THE COURT JESTER. You say this is an exception, THE COURT JESTER?

Now, at 2084, I asked you about THE COURT JESTER, and then I said:

> You have told us that the prior performance of a picture at a particular theatre, the same theatre, of the same company, the same distributing company, is important in evaluating a better offer; hadn't you told us that?
>
> A. Yes, sir.

So at that time at page 2084 you weren't making an exception of THE COURT JESTER, were you?

A. I didn't have these before me at that time, sir.

Q. The prior performance of Paramount at your Viking Theatre

(3783)

had nothing to do with the sheets you had before you of other bids?

A. I said that, sir.

Q. Therefore, there is no exception to the statement you made about THE COURT JESTER, that a prior experience—and you were talking about THE COURT JESTER—is a factor which the motion picture company has a right in all fairness to consider; isn't that so?

A. Yes, sir.

Q. All right.

A. If there are bids submitted and they are comparing them they have every right—they can give consideration to anything, sir.

Q. You were making a big point about the eighth on one of those letters. Whose was that? Stanley or Arcadia?

A. The bids were returnable here December 8 and the Fox Theatre on December 8 says that they are not inter-

ested in submitting an offer, and these other two bids are December 13, sir.

Q. Here is the back page of your own bid, and it says "Rider for THE COURT JESTER, bid due December 13, 1955." Will you now admit that your time was extended to December 13 like everyone else's?

A. It probably was, sir.

(3784)

Q. So there is nothing left of all this that you said before, you want to take that back, don't you?

A. Why should I?

Q. Now that you see it.

A. Now that I see it I was in error.

Q. That was an error on your part?

A. Yes, sir.

Q. All right.

Mr. Sawyer: What is the date? Let us see it.

(Counsel confer.)

By Mr. Nizer:

Q. In the light of this correction which you have just made—

(Counsel confer.)

The Witness: That is the request for offer on top of it.

By Mr. Nizer:

Q. So you did see it?

A. Yes, sir.

Q. And was it extended to December 13, there is no doubt about it?

A. I didn't see an extension, sir. I am indicating where the date appears, December 8, returnable at 5:00 P. M.

I saw the date on this rider that you gave me.

(3785)

yes. I have never seen any extension of time. It evidently was or it wouldn't appear on it.

Mr. Sawyer: All right.

By Mr. Nizer:

Q. Now, you admit that, this was sent to you. You sent this in and it was put on.

A. Yes, sir, I must have. I concede that.

I said I have not seen as yet an extension of my time.

Q. All right, I understand that.

A. An extension of my bid due time.

Q. Now, Mr. Wren, in view of that, since the dates of these other things were the only thing that stopped you from answering my question, may I try once more?

Paramount, in all fairness, was justified in considering the experience, prior experience of your theatre with LUCY GALLANT when it suffered a loss, and considering the good experience it had with the Midtown Theatre, $150,000-odd gross, when it decided whom to give this picture, at any time that they decided to do it; that was a factor of prior experience which you concede it was justified at least in taking into account, right?

A. Yes, sir.

Q. All right.

(3786)

A. On bids.

Q. On bids, negotiations—

A. All right, sir.

Q. —competitive negotiations or anything else, right?

A. Yes, sir.

Q. Now, let us go to the next Paramount picture you mentioned which is THAT CERTAIN FEELING.

A. Yes, sir.

Q. (Writing at the blackboard.) Even on all the assumptions that you made—this picture played at the Midtown, did it not?

A. Yes, sir.

Q. Now, even on all the assumptions that you would have had the same gross as the Midtown, and you took the advertising into account in this case, you will concede, will you not, that even on that basis the Midtown paid a larger film rental than the Viking would have paid?

A. We said that.

Q. Will you concede it now?

A. We said that yesterday. We said they paid $3,767.93 more than the Viking would have paid.

Q. How much?

A. $3,767.93 more than the Viking would have paid.

Q. Now, actually, if you put the special advertising clause

(3787)

which you had in this case, which was for four weeks, some $1,400—$1,050 and $125 times three for the other three weeks, that figure would go another $4,700 or something like that, wouldn't it?

A. I didn't hear that, sir.

Q. You in your contract had a very special advertising clause which required certain billboards, signs painted, any extra advertising clause that cost the distributor about $1000, isn't that right?

A. Yes, sir.

Q. Now, if you added that, in addition to the regular advertising, the Midtown would have paid still more money than the Viking, more than $4,000 more film rental, right?

A. $1000 plus about $1,300 more.

Q. That is right. Therefore, can we strike that one out of the list?

A. We said that yesterday.

• • •

(3790)

Q. The next Paramount picture is THE MOUNTAIN. Now, in this matter your bid of the Viking was 90/10 over $5000 plus news, shorts and overtime, and no guarantee, is that correct, sir?

A. Yes, sir.

Q. And in addition to that the distributor was to pay all advertising, correct?

A. Yes, sir.

Q. And then in addition to that you gave a minimum of only two weeks, right?

A. I am not sure about the playing time, sir. I don't have

(3791)

that on the sheets.

Q. Well, will you accept that from me, two weeks? Minimum of two weeks.

You didn't put it in your statement here, but I am giving that to you from your offer. Here it is: Minimum two weeks. And with a holdover of $16,500, correct?

A. Yes, sir.

Q. All right.

A. No, holdover of $12,000 the second week.

Q. All right. $12,000. Now you have already testified that that kind of an offer, no guarantee, 90/10 over these expenses, the distributor to pay all advertising, is a poor bid for the distributor. You recognized that, correct?

A. Yes, sir.

(3792)

Q. And the offer which was accepted in this case had a sliding scale of 25 per cent for less than $13,000, which went up to 50 er cent—it is very involved and I hope I don't have to go through it—but it was a very involved sliding scale with different figures from 25 all the way up to 50, with an indefinite run. And you would certainly say,

would you not, that that to a distributor, you concede that your offer is the poorer kind of offer for a distributor and that a sliding scale of this kind is at least more favorable to a distributor to consider, isn't that so?

A. Depending on what other conditions are in there. I am committing myself for two weeks and this depends on how he spells out advertising and everything else that is requested.

Q. Well, if you want the others I think that is a fair request. The other is an indefinite run, so that is better than two weeks, isn't it, undoubtedly?

A. Go ahead, sir.

Q. Well, please answer, not "go ahead."

A. Yes, sir.

Q. The answer is yes, isn't it?

What else would you like to know?

A. What was the advertising clause in the bid?

Q. Advertising clause, they later paid—

(3793)

Mr. Nizer: Can we get an exact figure of the advertising?

Mr. Phillips: $1,159.60.

By Mr. Nizer:

Q. They paid $1,159. In other words, they did it on a 50 per cent basis.

A. What was the advertising clause in the bid they were considering, sir?

Q. I do not know at this moment, Mr. Wren. Please do not simply contest with me. Let's deal with facts.

A. I want to, sir.

Q. Do you know—

Mr. Sawyer: Isn't that legitimate? Isn't that a fact?

Mr. Nizer: Just let me ask the question.

Mr. Sawyer: The witness has asked you for something.

By Mr. Nizer:

Q. Will you accept, without my going into the documents, that the Goldman Theatre paid—

Mr. Nizer: Give me 112.

By Mr. Nizer:

Q. —was paid $1,159.60 of an advertising—

(3794)

Mr. Nizer: How much is the total advertising here?

By Mr. Nizer:

Q. —$2,319.28.

I will show you the original document.

Mr. Sawyer: What is that, the bid?

The Witness: I want to see the bid; sir, please. May I see the—

• • •

(3795)

By The Court:

Q. Why is it necessary for you to see the bid?

A. He asked me, "In considering the bid, wouldn't you say—" And I would like to know—

Q. No, he didn't say that. He said if you look at that statement—

A. This only covers newspaper advertising, sir.

Q. What?

A. It doesn't say what the theatre agreed to when they submitted the offer.

The Court: Well, as I understand the question, Mr. Nizer, isn't it this: If the witness looks at that paper does it indicate to him that Goldman paid so

much advertising and the distributor paid so much advertising?

(3796)

Mr. Nizer: Precisely right, Your Honor. That is exactly the question.

By Mr. Nizer:

Q. Isn't that a fact, Mr. Wren, by looking at it?

A. It says that Paramount paid $1,159.60 of a $2,319.21 newspaper campaign.

Q. All right.

A. Right, sir.

Q. That is ads?

A. Right, sir.

* * *

(3799)

Q. Mr. Wren, during the recess we called for the production of an original telegram that was delivered to you by Paramount on THE COURT JESTER on this question of dates. You remember you raised it?

A. Yes, sir.

Q. I asked counsel to show it to you so that we would save time. You have seen this telegram?

A. Yes, sir.

Mr. Nizer: I offer it in evidence.

(Telegram dated December 5, 1955, to Jay Wren, from Ulrik F. Smith, was marked Exhibit D-80 (Paramount) for identification.)

Mr. Nizer: May I read this? It is extremely brief, Your Honor.

The Court: You may.

By Mr. Nizer:

Q. This is a telegram from Ulrik Smith. That is the branch manager of Paramount, is that correct, Mr. Wren?

A. Yes, sir.

Mr. Nizer: It is addressed to the Viking:

Due to the screening of the COURT JESTER on Wednesday the due back date on the request for offer

(3800)

dated 12/1/55 will be 12/13/55 insead of 12/7/55.

Signed Ulrik Smith

By Mr. Nizer:

Q. So now there is no doubt you were notified of the extension by telegram, right?

A. Yes, sir.

Q. Now, coming back to THE MOUNTAIN, we reached the point before recess, Mr. Wren, where you stated that the bid that you offered on THE MOUNTAIN was a poor type bid from the distributor's viewpoint. Then I asked you about the bid made, the terms of the Goldman Theatre situation. Now I want to ask you whether in your statement from which you made your blackboard demonstration you did not completely omit advertising as applied to this situation.

A. Yes, from both computations.

Q. You omitted it from both?

A. Yes, sir.

Q. And you didn't say it wasn't available to you, did you?

A. No, sir. We don't have that indicated here.

Q. And of course it is available to you. It was just as it was on THAT CERTAIN FEELING, when you did have the advertising?

A. Yes, sir.

Q. But you left it out.

(3801)

Now, without that advertising applied to this, this obviously cannot be correct, can it?

A. No, sir.

Q. So let's correct it, will we?

A. Good.

• • •

Q. (Writing on blackboard) This is THE MOUNTAIN?

(3802)

A. THE MOUNTAIN.

Q. The Paramount picture we are discussing now.

Your final conclusion here was that the Viking would have paid $951 more under your computation; in round figures, $950 more film rental, right?

A. Yes, sir.

Q. And the way you did that of course again was to make the assumption you always make, that you would have done at the Viking what the—which theatre played this?

A. Goldman Theatre.

Q. The Goldman Theatre. That is the way you did that?

A. Yes.

Q. Then we won't go through the assumptions.

But you left out the advertising?

A. Yes, sir, on both.

Q. On both?

A. Yes, sir.

Q. And of course you have already conceded that without the advertising this doesn't make any sense; so we are ready to correct it. So let's correct it.

You put the figure down for the Goldman of a film rental of $2217—well, again, I will make it round figures, $2200, right?

A. Yes, sir.

(3803)

Q. Film rental paid by the Goldman.

A. Yes, sir.

Q. That is where you stopped?

A. Yes, sir.

Q. Now you have the advertising sheet which His Honor asked you about before recess in front of you, have you?

A. No, but I have the amount. $1,159.60 for newspapers.

Q. All right. Thank you. $1100?

A. $59.60.

Q. Let's make it $1,150 again for round figures.

That would be deducted, right?

A. Yes, sir.

Q. So that is the net film rental paid to Paramount, $1,050, right? Now let's take the Viking. You left out the same advertising there, didn't you?

A. Yes, sir.

Q. Let's take your figure on your assumptions which I am going to follow you on. You would have had $3,100 in round figures, correct?

A. Yes, sir.

Q. And under your advertising clause of the offer that you submitted you would have had to pay the—the distributor would have had to pay 100 per cent, correct?

(3804)

A. Yes, of the advertising.

Q. How much is that on that? Did you take the figure down?

A. Twenty-two—wait a minute, $2,318.

Q. In addition to that there was that special clause of about—

A. That is what I am not sure of. Is that in the special clause?

Mr. Sawyer: No.

By Mr. Nizer:

Q. Yes, yes. I can represent it to you.

A. All right, a thousand dollars more.

Q. So it is a thousand dollars more. Give me the total figure.

A. $3,318.

Q. Thirty three in round figures. So that on your own calculation Paramount would have lost $200 on this engagement, right?

A. Yes, sir.

Q. Are you ready to strike this?

A. No, sir. I haven't seen the bid to see what the bid advertising clause was, sir. I know what the reimbursement was.

The Court: Who had the bid? Let him look at it.

Mr. Sawyer: Can he look at the other bid, too, Your Honor?

The Court: Let him look at the other bid.

(3805)

The Witness: Let me see the Goldman bid.

Mr. Steinberg: This is the Viking bid.

The Witness: Let me see the Goldman bid.

By Mr. Nizer:

Q. Now, in view of the fact—first let me ask you in an effort to cut through this question. You saw the actual record of the amount paid by Goldman for advertising, and what Paramount paid on the original document, correct? You saw that; I showed it to you.

A. You mean on newspaper advertising? Yes, sir.

Q. You keep saying newspaper. That is advertising, isn't it?

A. That isn't all the advertising, no, sir. There may have been more. That only covers newspapers, the Inquirer, the Bulletin and the News.

Q. Then let me ask you this. Then that figure might grow from minus 200 to minus more.

Is it a practice where you had a percentage engagement, not 90/10 over house expense, but a percentage en-

gagement, is it the practice, unless you have a special clause that the distributor must pay, for both of them to share in accordance with the percentages?

A. No. You pay in proportion to film rental earned, meaning

(3806)

the distributor will pay 75 per cent when he only pays 25 per cent film rental. Paramount here requests—

Q. Slowly, slowly, sir.

A. Yes, sir. "Amount you propose to spend for advertising." In the William Goldman bid there is no reference to advertising whatsoever.

Q. I show you THAT CERTAIN FEELING, which is the picture before this, you understand.

A. Yes, sir.

Q. That is the William Goldman offer. There is no reference to advertising there, either, is there?

A. No, sir.

Q. Yet you put on the blackboard originally the advertising which you found in the record had been expended, didn't you, in your own computation?

A. THAT CERTAIN FEELING?

Q. Yes.

A. If we indicated it, yes, sir.

Q. And you did it in accordance with the percentages of the William Goldman proposal, all the sliding scales which I hope we won't have to go through.

A. No, sir, I didn't do it in accordance—

Q. How did you do it?

A. We must have gotten records from Paramount, or somebody

(3806a)

supplied the figures of what the advertising was. But it doesn't alter the fact that Paramount says "Amount you propose to spend for advertising," and it is not indicated in either one of these bids.

(3807)

Q. Well, now there was—slowly—whatever the advertising was under that kind of a deal of percentages, there is a sharing between the exhibitor and the distributor; right?

A. But how?

Q. Wait a while.

A. In proportion to film rental or how?

Q. Don't ask me questions. Will you please, again, Mr. Wren—

A. I am asking how it is done, sir.

Q. I know you are. Now, will you be good enough to answer my question and we will make better progress.

I asked you whether under a percentage deal, without house overhead, it isn't the fact, as you have acknowledged on THAT CERTAIN FEELING, that no matter what the advertising is, it is shared in certain percentages between the exhibitor and the distributor.

A. Not always, sir.

Q. No. I didn't say always.

A. No, sir.

Q. If there is a special clause that the distributor pays it, the kind you put in, it is different, but if there is—

A. I spell out what I expect.

Q. —if there is no clause on advertising, then two people get together and they apportion it according to their percentages; isn't that the customary practice?

(3808)

A. Well, if they do, then it is not right, sir, because if they apportion it according to the percentage of the film rental earned, Mr. Goldman should have paid 75 per cent of the advertising instead of 50 per cent of the advertising. He only paid 25 per cent film rental.

Q. Well, if you paid 50 per cent for advertising, that is 50 per cent more than under your terms you would have paid; right?

A. Definitely; but I so specified.

Q. All right; now, let us suppose that is a virtue for the moment, because I am not going to get into advertising at this time. We are going into that, but not now.

A. But they requested that I furnish it.

Q. Mr. Wren, there is no question before you, and if we will proceed by my asking a question and your putting an answer, I think it would be better, don't you?

A. Yes, sir.

• • •

(3809)

Q. On THAT CERTAIN FEELING, the picture before this,—

A. Uh-huh.

Q. —you put in advertising expenditures yourself, didn't you? You deducted in that case, did you not?

A. Yes, sir.

Q. And look at the William Goldman offer. There is no clause about advertising available; it is silent on that, isn't it, in the offer, doesn't say—

A. Yes, sir—both of them are silent.

Q. —doesn't say one way or the other; yet you put in yourself an acknowledgment of the fact, having looked up the records, that they both contributed to each other, that Paramount and William Goldman Theatres towards that advertising; that is what you did yourself before I even cross-examined you; correct?

A. Yes, sir.

Q. Now, I ask you on THE MOUNTAIN, the same situation applies. I show you the offer. It is silent as to advertising, though it has a full scale of percentages, correct, the same as THAT CERTAIN FEELING?

A. Yes, sir.

Q. Now, in that instance, too, we will have to put in some

(3810)

advertising, as you did on THAT CERTAIN FEELING; right?

A. Yes, sir.

Q. Now, I showed you a document which showed the proportion that they each paid, and you tell me it is advertising of newspapers only.

A. Yes, sir.

Q. Now, I ask you, assume that there was even more advertising—and I don't know of any, and I am going to try to find it, if there is any.

Mr. Nizer: Is there anything there?

By Mr. Nizer:

Q. It is represented to me, if it will help you, that there is nothing else, just newspaper advertising—that is all that was charged—but I will even assume, since I am not certain; I am told this—I will even assume that there might be then some other charges. Certainly under that deal Paramount would pay some and the Goldman Theatre would pay some; right?

A. Yes, sir.

Q. Now, under your offer that you say should have been accepted, no matter what it was, smaller or larger, Paramount would have paid a hundred per cent; correct?

A. Yes, sir.

Q. Now, if you assume with me for a moment that the only advertising that was engaged, involved in this picture was the

(3811)

newspaper advertising from which I showed you the record —I have no other record; assume that now—it is true on that assumption that Paramount, according to your own calculations, if you had gotten the picture, would have lost $200, something like LUCY GALLANT, let us say, whereas

the Goldman paid over a thousand dollars net. On that assumption, this is true, isn't it?

A. With reservations.

Q. What is the reservation?

A. Well, we have been constantly saying, when the man has it in front of him to evaluate, he takes everything into consideration including performance.

Now, here how could he consider—evaluate the bid without an advertising clause? I give him an advertising clause, as he requests. This man gives him nothing. So how can he evaluate?

Q. Well, you are going by hindsight as to what the picture did, and you are not only going by hindsight—you are taking the gross of another theater—and are you not objecting to doing the same thing with advertising, looking at what actually happened and taking the actual figures? Do you object to that now?

A. No. I am objecting—

Q. Oh, all right.

(3812)

A. —to the phrase "evaluate."

Q. All right, then, I will agree that the—

A. I don't know how you can evaluate a bid like this without an advertising clause, especially when they ask for one.

Q. Well, don't you recognize and haven't you done the same thing where there is a percentage provision, no 90/10 over $4970.19, but just a percentage provision—haven't you gotten together later with the distributor to share the advertising in accordance with those percentages? Haven't you done that yourself?

A. Yes, sir, if there was a provision to that effect such as advertising to be mutually agreed upon.

Q. Now, suppose there isn't. Suppose that it is silent. On a percentage deal, wouldn't you expect to come together with the distributor and decide with him what the propor-

tion of expenditures should be shared? On a percentage deal, a straight percentage deal, isn't that the practice?

A. No. They will call me and ask me what I propose to do before I am awarded the picture.

Q. All right; now, on the assumption that I have just made—namely, that this was the total amount of advertising and that this is the actual record by hindsight,—

A. Yes, sir.

Q. —just as you have taken hindsight — then you would have

(3813)

—paid far less film rental on your own computation than the—oh, right on that assumption?

A. Yes, sir.

Q. Are you willing to strike this out? "Yes" or "No?"

A. With reservation.

Q. All right—strike it out with reservation.

Now, let us take HELL'S ISLAND which is your next Paramount picture, sir. This is the picture, Mr. Wren, which you were going to play double feature with FOX FIRE. Do you recall that situation?

A. Yes, sir. I indicated that; yes, sir.

Q. And HELL'S ISLAND was going to be played as the lower half of the double feature; correct?

A. Yes, sir.

Q. And you advised Paramount to that effect, did you not? You had to advise them—

A. I think we said it would be played as a second feature.

Q. Yes; but you also advised them that it would be played at the lower-half of the bill, did you not? That is a matter that you have to tell the distributor so he knows.

A. I think the bid just said, "To be played as a second feature."

Q. Now, you have said that. I have asked you another question. My question is, did you also advise them it would

(3814)

be played the lower half of the bill?

A. I don't recall whether we did or not, sir.

Q. Now, in order to make it clear for His Honor and the jury, this being a technical matter, a double feature—we know what that means—but the second half means that there is always a top feature which is supposed to draw them in a little better than the lower one which is added on which is weaker; is that right? That is what lower half—

A. Yes, if you bill it that way; yes, sir.

Q. And HELL'S ISLAND you had intended, this Paramount picture, to play it at the lower half of this double feature; correct? You have told us that, haven't you?

A. Yes, sir.

Q. Now, you withdrew FOX FIRE, didn't you?

A. Yes, sir.

Q. Your offer on FOX FIRE, that was the situation where 13 days went by and you just pulled it out?

A. Yes, sir.

* * *

(3817)

Q. Now, you will recognize as a factor in determining whether a bid is acceptable that the distributor certainly is justified in considering the fact that the bid calls for a double feature of its picture rather than a single feature, particularly first-run; isn't that so?

A. Only in so far as their interest as charges are concerned. If I say I am going to play a picture of theirs and deduct actual cost of the second feature or something, then they would be concerned, but where I make a flat offer like that, they know they are going to get X amount of dollars for a given time.

Q. Have you ever been engaged in the distribution of films?

A. No, sir.

Q. Your only experience in this business is as an exhibitor?

(3818)

A. Yes, sir.

Q. And your only experience for first-run metropolitan territory is in this theatre?

A. Yes, sir.

Q. Nevertheless, since you have given opinions here from a distribution viewpoint as to what the distributor should have done, I shall have to ask you these questions: Do you think it is a fair consideration for a distributor to worry not only about what will happen with his picture at your theatre or at the Goldman Theatre, but how that picture will be affected when it goes out into the subsequent run, to the neighborhood theatres? There is such a thing as prestige for a picture, establishing it, is there not?

A. I would say so; yes, sir.

• • •

(3819)

Q. Now, to make it clear to the jury and to His Honor, I show you your bid and ask you if Paramount was informed that you were going to play this double bill, double feature, irrespective of FOX FIRE.

(3820)

A. Yes, sir, approximately on availability, double bill.

Q. Well, don't give me availabilities now. Listen to my question. We don't want to get into other things.

Now, therefore, I come back to my original question. Do you consider it reasonable for a distributor to take into consideration the fact that if his picture, which should be a first-run picture in a downtown big situation like Philadelphia, is going to be played double bill, that this will affect his income from subsequent runs because the picture will be tarnished in the eyes of other exhibitors? Isn't that a fact of the business, a fact of life of this industry?

A. It may be.

Q. And isn't it similarly a fact that if a picture is delayed in playing at a theatre, instead of playing nine weeks, it plays fourteen weeks, as you did, that that holds up the release of the picture to the second runs, neighborhood theatres, in the whole city; right? Five weeks—holds it up that much, doesn't it?

A. In some instances.

Q. Well, with rare exceptions, when a picture is playing first-run, it is not released to subsequent runs, is it?

A. Which subsequents, sir?

(3821)

Q. First neighborhood theatres, first-run neighborhood theatres, other theatres that follow—

A. Well, now—

Q. —in a whole sequence?

A. —of course, naturally, that is what I am trying to explain to you. There is provisions in these clearance schedules now where Norristown comes in 21 days no matter how long they play the picture.

(3822)

Q. That is right; but I say that if it plays fourteen weeks instead of nine weeks, Paramount is held up in that case from releasing the pictures and the people around the community who wait for that picture are delayed by five more weeks—

A. But prestige—

Q. —in the ordinary case.

A. —accrues during this period.

Q. Pardon me?

A. Prestige accrues during this period.

Q. If the picture plays at the Viking fourteen weeks instead of at the Randolph nine weeks, prestige accrues?

A. Or if COUNTRY GIRL plays at the Midtown fifteen weeks; yes, sir.

Q. No—I am asking you this question: If in order to achieve the gross of the Randolph, according to you, you have to play fourteen weeks instead of nine weeks; isn't that a factor for the distributor in that he is prevented from accelerating his liquidation of the picture? Am I making myself clear?

A. No, not in that respect, sir. I don't understand it.

Q. Before Paramount can get in this couple of million dollars that it has invested in a picture, it has got to play, doesn't it?

A. Yes, sir.

(3823)

Q. The longer it is held back, the longer it takes to get the money back; right?

A. No, sir. I think you have indicated, sir, that 25 per cent of—of the nation's theaters supply the bulk of the money.

Q. Yes—and I still agree with that.

A. Well, they are the first-run theaters, sir.

Q. That is right; now—

A. So the neighborhood is—

Q. Not important?

A. I didn't say it was not important, but it is a very small portion, sir.

(3824)

Q. What did that gesture mean?

A. It is a very small percentage of the income, by your statement, sir.

Q. It isn't very small, sir. It could be very well—in a picture that cost three million dollars it could well be a million or a million and a half dollars. That is a lot to get in half of your picture from just the first-run situations when you have thousands of other theatres waiting, isn't it?

A. A million dollars first-run Philadelphia, sir?

Q. I didn't say Philadelphia, I am talking nationally, a three-million dollar picture.

A. I am talking about the neighborhoods in Philadelphia, sir.

Q. Again, sir, I will withdraw it if this gets me into a contention.

I would like to have you answer this as candidly as you can and I will drop it. I know you are not a distributor—

A. Yes, sir.

Q. —yet you have testified to the judgment of a distributor, so I take the liberty of asking you this: Do you think a distributor like Paramount considers, when it has proposals before it, whether its picture will play double feature and

(3825)

therefore the picture may be hurt in its income in subsequent runs; is that a factor that would be important in your opinion?

A. I think I said it may be.

Q. Could you be a little more definite than that?

A. No, because they might also consider that a picture of this caliber, $1,600 is a lot of money for it.

Q. Well, as Sam Goldwyn once said, will you give me a definite maybe?

A. (No answer.)

Q. All right, maybe.

Do you consider, Mr. Wren, that in addition to that a distributor has a right to consider how long the picture will be held up from general release because the first-run has got it; that is a factor, isn't it, prestige or no prestige, that is one of the factors that goes into the scales?

A. I would assume it would be, yes, sir.

Q. Now, if HELL'S ISLAND had been awarded to you for a double bill, as your bid stated, do you not think that that in the distributor's judgment could honestly be con-

sidered as an unfavorable factor in how it might hurt it in its later income; that is a fact, isn't it?

A. I would assume it would be on a more important picture,

(3826)

not on this one, sir.

Q. Well, now, this picture, there was money invested, and whether you considered it very important, it would be a factor to consider, wouldn't it?

A. Yes, sir.

Q. Now, this picture was awarded finally—there was a negotiation after the bids were rejected and it was finally played where at the Mastbaum?

A. Yes, sir.

Q. And it played at the Mastbaum single feature or double feature?

A. Single.

Q. Single?

A. Yes, sir.

Q. And since you have talked of prestige, do you think it has a prestige to play single feature, a better prestige to play single feature rather than your offer of double feature?

A. Well, it so happens, sir, that the prestige did not accrue because the majority of the Philadelphia theatres played it on the lower half of the double bill in the neighborhoods.

Q. Now will you answer my question: Do you think that it was a factor to be considered reasonably by Paramount that a single feature playing at the 4000-seat Mastbaum gives it

(3827)

more prestige than a double bill at the Viking; isn't that a fact? Can't you say yes to that without even maybe?

A. No, sir, I cannot say that, sir.

Q. All right, you can't.

A. It might be exposed to more people on a double-feature bill and it might create more who want to see it because of that thing known as word-of-mouth.

Q. And you didn't have enough confidence in this picture, the only word-of-mouth that you thought that this picture would have is a very bad word-of-mouth; is that right?

A. Not necessarily so. You might come in and enjoy it on a double-feature bill.

Q. Your bid for this picture, you have testified, when I cross-examined you, showed that you had no confidence in this picture, and that it was a very bad proposal; it was a flat rental, wasn't it?

A. There is nothing bad about flat rental, sir, if it is going to mean more goes to the distributor.

Q. Mr. Wren, again you are not a distributor, but won't you concede that the worst kind of a deal for a distributor ordinarily is a flat rental, because he has no potential of going above his flat rental; correct?

A. Well, there again, sir, it depends on the amount and the picture.

(3828)

Q. Your amount wasn't imposing, it was for three weeks, $750, $500, $375, a total of $1625 for three weeks. We have been talking here of tens of thousands of dollars. Doesn't this indicate to you that a flat rental was the lowest of the low that you could offer? Does it indicate that?

A. No, sir, it does not, to me.

Q. Where you have a percentage engagement, Mr. Wren, the distributor, no matter what happens, has a chance to get more for the picture if it draws them in, correct?

A. If the picture draws them in, yes, sir.

Q. And if you have a flat rental, whether the picture draws them in or not, the distributor can never get a cent more than $1625?

A. No, sir.

Q. Therefore, isn't it a fact that in this industry the distributor almost invariably, particularly on good pictures, insists on a percentage, and the distributor is tickled to death if he will ever accept a flat rental; is that right?

A. "And the distributor is tickled to death"?

Q. "The exhibitor," I said.

A. You said "distributor."

Q. I am sorry.

(3829)

A. The exhibitor is tickled to death if you accept a flat deal.

Q. If he can get the distributor to accept a flat rental.

A. Well, there again it depends on the flat rental.

Q. And this flat rental, do you think this was a good bid?

A. I do, sir, for HELL'S ISLAND.

Q. Have you testified that you considered this a poor bid?

A. I may have.

Q. You not only may have, you did, didn't you?

A. I don't recall, sir.

Q. The Mastbaum which played this picture—incidentally, your bid was rejected on April 8, 1955.

Mr. Nizer: Can we agree on that, Mr. Sawyer, please?

Mr. Sawyer: Yes.

Mr. Nizer: To save time.

And the contract with the Mastbaum was May 19, 1955, that is, a month and 11 days later.

Will we agree on that, too, sir?

Do you have the dates in front of you?

Mr. Sawyer: I do not have it in front of me.

Mr. Nizer: All right, subject to check.

By Mr. Nizer:

Q. Now, the Mastbaum played this picture one week single

(3830)

feature, and the terms, let me give them to you, unless you have them there, are 25 to 50 per cent on a sliding scale; correct?

A. 20 per cent I have here, sir.

Mr. Nizer: I have 25.

Can you refresh me on this?

Mr. Sawyer: Because it was adjusted.

The Witness: It was adjusted to 20. I am sorry.

Mr. Nizer: It was 25. I am talking of the bid, the offer.

The Witness: I haven't seen the offer.

Mr. Nizer: It wasn't a bid, it was a negotiation. 25 to 50 per cent sliding scale.

Yes, it says minimum 25 per cent.

By Mr. Nizer:

Q. And going to prior experiences at the Mastbaum for similar pictures, that is, national film rental of $680,000, or $[illegible]00,000, similar to that extent, would you accept my figures, subject to your check, that the Mastbaum had had receipts in one week for such pictures of $15,000; so that Paramount had that experience at the Mastbaum Theatre; will you accept that subject to check?

A. Pictures comparable to HELL'S ISLAND, yes, sir, subject to check.

(3831)

Q. All right. And similarly—well, I won't mention the pictures, a number of them—the film rentals on those comparable pictures to Paramount had been in the neigh-

borhood of $3,000—it varies on several pictures, but I will give you the exact figures, $3,143 net to Paramount, as against your $1,625 flat rental.

A. Net.

Q. Net. Correct.

A. Yes, sir.

Q. Now, Ulrik Smith is the branch manager of Paramount who negotiated this first with you and then with the Mastbaum; correct?

A. No, I believe he rejected the offer and then negotiated.

Q. I mean he first dealt with you?

A. Yes.

Q. And rejected your offer and then dealt with them?

A. Yes, sir.

Q. And Ulrik Smith, of course, is an experienced and an old executive in this industry, is he not? Do you know him favorably?

A. Yes, sir.

• • •

(3832)

Q. Well, Mr. Ulrik Smith as branch manager, one of his duties is to pass upon and make a recommendation concerning these various bids or negotiations; correct, as a branch manager?

A. I believe he said he sends them to New York, yes, sir, he doesn't touch them.

Q. He does, but he makes the recommendation?

A. I believe he says he doesn't. I believe he so testified. I think he said in depositions he sends the bids right to New York with no recommendation, right to his Bidding Department.

Q. I won't go into that now. We will have an opportunity to do that.

Your Viking bid, of course, gave no guarantee, did it?

A. Yes, sir, a guarantee of $1,625.

Q. Well, that is the way you referred to it, and that is inaccurate, isn't it?

A guarantee means a minimum that you will pay and if the receipts are higher a certain percentage above it;

(3833)

isn't that what guarantee means in this industry?

You give a guarantee against the receipts, which means that if the receipts go beyond the guarantee the guarantee doesn't count; if it goes below the guarantee is paid; that is what a guarantee means in this industry, isn't that so?

A. Well, no, this is a guarantee too, sir. I am guaranteeing him I pay him $1,625 no matter what.

Q. No matter what? Let us see. Suppose that the picture turns out to be an enormous success, can the distributor get one cent more than $1,625?

A. No, sir.

Q. Suppose in a guarantee case the picture turns out to be a success and you have guaranteed $1,625, and then certain percentages, would the distributor get more money?

A. Yes, sir.

Q. Well, now, isn't it therefore a customary usage in this business to distinguish between a flat rental and a guarantee against receipts; isnt it?

A. If you want to call it flat rental, yes, sir.

* * *

(3834)

TWENTY-THIRD DAY

* * *

(3836)

JAY WREN, recalled.

CROSS-EXAMINATION (Continued)

* * *

By Mr. Nizer:

Q. I call your attention to THE BIRDS AND THE BEES, the Paramount picture.

Now, this picture was awarded to the Midtown Theatre, was it not?

A. Yes, sir.

Q. And this is another instance in which you attempted to show by later developments and calculations why Paramount before it had these calculations should have awared the picture to the Viking. That was the purpose of this demonstration; correct?

A. Yes, sir.

Q. And in order to do so here, as in all other cases, you assumed that you would have had the same box office receipts for the picture as the other theatre which did play the picture had; right?

A. Yes, sir.

Q. Now, who is the star of THE BIRDS AND THE BEES; George

(3837)

Gobels, do you recall?

A. You are right, George Gobels.

Q. And this was the first motion picture he made, is that right; do you know that?

A. I believe it was.

Q. He had been a television star, is that right?

A. Yes, sir.

Q. So they tried him out in motion pictures?

A. Yes, sir.

Q. And I think you have told us about the vagaries of this business and public taste, how uncertain it is; he did not go over in motion pictures the way he did on television, did he?

A. I believe that is right, yes, sir.

Q. So according to your own demonstration on the engagement at the Midtown the loss suffered by Paramount was a net loss of $1213 on that engagement.

A. Yes, sir.

Q. That picture, as you know, did poorly all over the country, did it not? From your general knowledge of the industry, or don't you know that?

A. No, I don't know that.

Q. All right. Now, your calculation was to show that instead of losing $1213 if you had gotten the picture Paramount would have gotten $800.

(3838)

Mr. Sawyer: No.

The Witness: No. The loss would have been reduced by $800.

Mr. Nizer: Yes.

The Witness: Their loss would have been $348 at the Viking Theatre.

Mr. Nizer: All right, I see.

By Mr. Nizer:

Q. So that you say the $1200 would have been reduced in the loss and Paramount would have lost but $400?

A. Roughly, yes, sir.

Q. Yes, I am talking roughly. And with all these calculations and assuming the gross receipts of the Midtown

as being your gross receipts, with all that hindsight, you say that Paramount should have awarded you the picture, because if all this could have been foreseen, according to your calculations, Paramount would have lost less money on this picture by some $800, right?

A. Yes, sir.

Q. Instead of $1200.

Now, do you think, even though you had no experience in distribution, that you or anyone else could have foretold that George Gobel's first picture called THE BIRDS AND THE BEES would do that poorly, that these would have been the results; would you have foretold all that within a four hundred

(3839)

or eight hundred dollar figure?

A. Of course not, sir.

Q. Now, so far as the bids themselves are concerned in this case the Viking offered no guarantee?

A. No, sir.

Q. And the distributor was to pay all the advertising under your proposal?

A. No, sir, 50 per cent of the advertising, sir.

Q. I will accept that. I haven't it in front of me. If you say so I will accept it.

A. No, 50 per cent of the advertising.

Q. I see. Oh, but you had that large advertising clause.

Mr. Nizer: May I see 114, please?

(A paper was handed to Mr. Nizer.)

Mr. Nizer: I have it in front of me now.

By Mr. Nizer:

Q. I do not intend to read all this, but you had as an advertising clause annexed hereto a very involved, detailed, and complicated schedule of advertising in your offer, didn't you?

A. $1050, yes, sir.

Q. But that $1050 was in addition to these other general outdoor?

A. No, that is just the first week, sir, $1050.

(3840)

Q. That is right. And in addition to that, then there were the other charges?

A. No, no. It is $1050. If it plays any additional days, then it is $125.

Q. I say, in addition for additional days.

Now, I won't read all of it, but this advertising clause attached to this picture provided first for a $400 Viking Theatre advertising budget, didn't it?

A. Yes, sir.

Q. Then in addition to that it had general outdoor, painting, bulletins, and weekly rental, some painted bulletins; it had Stait Outdoor, is that right, or is that—

A. S-t-a-i-t.

Q. Painting of bulletins and other bulletins, weekly rentals, each charged separately. So that it is a general outdoor with weekly rentals, and that is another category, right?

A. All together it is $1050.

Q. $1050.57.

A. Yes, sir.

Q. Have you ever seen, looking through the contracts, any advertising clause like this, with these special provisions of $1000 roughly on any other contract?

A. On any other contract?

Q. On any other exhibitor.

(3841)

A. From any other exhibitor?

Q. Have you seen one like this?

A. No, sir, I never see advertising contracts.

Q. Now, the Midtown, which you have since examined in order to make your comparison on the board, had a 25 per cent to 65 per cent scale, didn't it?

A. Yes, sir.

Q. Whereas the Viking had a 25 to 50 per cent scale, a lesser scale than the Midtown.

A. To a degree, sir. Of course, I believe 65 per cent of the Midtown is $33,000.

Q. Whatever it is?

A. Yes, sir.

Q. No one could tell whether the picture would reach it, obviously it didn't reach it, in view of the loss.

A. Yes, sir.

Q. Now, these scales are of course, again without reading it all, but just to indicate the character of these bids—these scales are pretty detailed. For example, in your Viking offer there is a whole schedule: 25 per cent up to $9000, 27½ per cent to $10,000, 30 per cent at $11,000. It is a very large schedule of different figures with different percentages if the picture reaches a different height; is that right?

(3842)

A. Yes, sir.

Q. And similarly at the Midtown the 25 per cent to 65 per cent, they had a higher scale at the end, if it reached that height?

A. At the top, yes, sir.

Q. At the top.

A. But at the bottom it is higher too, is it not?

Q. That is right. No, 25—it is the same at the bottom, 25 to 65. Yours is 25 to 50.

A. Yes, but I am talking about the amounts. Mine is 25 to $9000.

Q. Theirs also starts at $9000. I have it here in my hand. Again I don't want to go into detail.

A. All right, sir.

Q. Just once more, to indicate the complexity of these offers that have to be weighed: 25 per cent if it reaches

$9000, 27½ of ten, and it grows up that way, step by step, up to thirty-three, with 65 per cent if it goes there, and each percentage goes up, grades up 1½ per cent as it reaches a different figure which is set forth.

A. Yes, sir.

Q. Now, Paramount, when it has these bids, as well as any others, before it—I will just limit myself to this—has to in anticipation before it knows the figures that we are

(3843)

using, has to in anticipation determine, make the best judgment it can as to whether a picture will go up to a certain figure, let us say, of $21,500, in which event there will be a certain percentage, or whether it will go a little below or a little higher.

This is not an exact science, is it?

A. No, sir.

Q. And the executive who has to make a decision with respect to these matters may be wrong when he makes his guess. He may have thought George Gobels was going to be a tremendous success due to his television popularity; therefore he would go way up, so that he would get 55 per cent from Goldman and only 50 per cent from you; if it did go that high, that would have been the difference, wouldn't it?

A. Yes, sir.

Q. And of course you, nor Paramount nor anyone else knew that George Gobels in his first picture wouldn't go up there, he wouldn't know whether he would or he wouldn't?

A. That is right, sir.

Q. Now, isn't it a fact that you will, in all fairness, say that the discretion exercised in such a matter, whether right or wrong, as it turns out, is not to be accused as being dishonest, even if the distributor makes a wrong decision by $800 or $400, as it ultimately turns out; isn't that true, you

(3844)

wouldn't charge him with dishonesty for making a decision one way or the other?

A. Not on one picture, sir, but when there is a pattern.

Q. No, I am talking about this picture.

A. On one picture, no, sir, I could not.

Q. Just to compare one or two other terms, we have found that the Midtown was higher in percentage if it reached a certain figure. Now, the Midtown on playing time had an indefinite run. Do you remember we talked about that yesterday?

A. Yes, sir.

Q. And your Viking submitted ten days instead of an indefinite run.

A. Yes, sir.

Q. And without reviewing that matter, just tell me now, what did you consider—what would you consider the indefinite run of the Midtown offer to mean to you if you were making a decision?

A. It depends on what the rest of the clause is. Just plain "indefinite run" means an exhibitor can take it off or the distributor can take it off, sir.

Q. Well, here it is specified, it says: The run of the picture will be indefinite, says the Midtown, termination of the engagement of the picture to be left solely to the discretion of the distributor.

A. Right, sir.

(3845)

Q. Now, that is an advantage to the distributor, isn't it, he can take it off, depending how it does?

A. Does mine have a similar clause, or does it just say flat ten days and that is it?

Q. It just says, minimum ten days flat.

A. Right, sir.

Q. Now, would you say that an indefinite offer is an advantage from a distributor's viewpoint over ten days flat?

A. When it is so specified that the termination is at the discretion of the distributor.

Q. Which it is here in this case.

A. Yes, sir.

Q. I am talking about this.

A. Yes, sir.

Q. You would say therefore that so far as the term is concerned, on its face, this also was more advantageous—I don't suppose very much—but more advantageous to the distributor, the Midtown's offer, than yours, on terms?

A. On playing time, yes, sir.

Q. On playing time.

A. Yes.

Q. Now, you know also that there were other bids here by Stanley, and that that was rejected, that is, the Stanley Theatre, their Mastbaum, put in a bid and it was rejected.

(3845a)

You know that, do you not?

A. I don't recall.

Q. What?

A. I didn't recall that.

Q. You will accept that?

A. Yes, sir.

(3846)

Q. Now will you turn to BRIDGES AT TOKO-RI, which is the next Paramount picture, and I think the last that we have.

Now, this is a situation where your theatre, the Viking, made an offer for this picture to Paramount, and that was the first time that the Viking negotiated or bid for a Paramount picture, is that right?

A. I don't believe so.

Q. Well, do you know—

A. I believe the bid for COUNTRY GIRL was before this, sir.

Q. No. I will give you the date.

THE COUNTRY GIRL played in February and it was a January situation. This is December. I have the dates, if you want them.

A. No. I was just interested in the bid due dates, that is all. I know the play dates.

Q. All right. Then will you accept the information I have that that isn't so? In other words, this was the first Paramount picture that the Viking Theatre attempted to negotiate a bid for?

A. Yes, sir.

Q. Because although the theatre had opened in July '54, you had played four Loew pictures, four pictures of the Loew

(3847)

Company continuously, and then you went for this picture which is the first Paramount experience, correct?

A. Yes, sir.

Q. Now, therefore, it is obvious that Paramount had no prior experience at your theatre, the Viking, with any of its pictures. That is obviously true then, isn't it?

A. Well, not at the Viking, no, sir, but they would have had experience, and a great deal of experience, with the Aldine.

Q. You mean the theatre that Stanley Warner had operated before it became the Viking, a year before it closed?

A. Yes, sir.

* * *

Q. You have referred to the experience a year before the Viking opened and when it was still the Aldine Theatre

(3848)

operated by the Stanley Warners,—

A. Yes, sir.

Q. —which closed it.

A. Yes, sir.

Q. And you say that Paramount had experience then?

A. Yes, sir.

Q. Now, between 1950 and the closing of the Aldine Theatre a year before the Viking opened, because it was closed for a year, Paramount had DARLING HOW COULD YOU which had a first week's gross of $3,799. Would you consider that a very bad gross?

A. I would consider it a very bad picture, DARLING HOW COULD YOU. That is the first I remember ever hearing of that one.

Q. But would you consider that a very bad gross?

A. I certainly would, sir.

Q. RHUBARB, for two weeks, which in two weeks grossed $10,000. Would you consider that a pretty poor showing, $5,000 average? I am giving you round figures.

Mr. Sawyer: What was the date of the picture?

By Mr. Nizer:

Q. RHUBARB.

A. I think THE BIRDS AND THE BEES would have only done

(3849)

that, too, if it played two weeks.

Q. Now will you answer my question? Don't argue with me.

A. I am not arguing. I think it is comparable to BIRDS AND BEES.

Q. I didn't ask you what it is comparable with. My question is would you consider the prior experience of Paramount, since you referred to the Aldine—and I am giving you the four pictures before it closed—RHUBARB, a Paramount picture, for two weeks grossed in round figures $10,000. Would you consider that—

A. Right, sir.

Q. Would you consider that a pretty bad showing?

A. I couldn't consider it good, no, sir.

Q. SOMETHING TO LIVE FOR, three weeks, $7,678. I am not sure—no, it is the third week. It couldn't have been three weeks. $7,678. A very bad experience, isn't it?

A. Same as BIRDS AND BEES.

Q. ANYTHING CAN HAPPEN, two weeks $7,000 in round figures. That is pretty bad, too, isn't it?

A. Yes, sir.

Q. So that even if the Paramount went back to the four pictures which had played between 1950 and the time that the Aldine Theatre closed for a year before the Viking opened it, that certainly would have been according to your statement

(3850)

certainly not encouraging to Paramount, would it?

A. Not in that period of time, sir. But they played some big pictures in there. They played UNCONQUERED. They played a lot of good Paramount product in the house.

Q. Oh, I am sure. I think we once had the TEN COMMANDMENTS, back in 1923.

A. Yes, sir, we did.

Q. A silent.

A. I just saw—

Q. I am not going back to that history, sir.

A. All right, sir.

Q. All right. Now coming back to this period—

A. Right.

Q. —so far as Paramount was concerned, in evaluating or attempting to determine the wisdom of a bid it had no experience with the Viking Theatre in your operation, Mr. Sley's and your operation, prior to this particular BRIDGES AT TOKO-RI, correct?

A. At the Viking, no, sir.

Q. Now, this picture was awarded to the Randolph, right?

A. The Viking bid on the picture. The offer was rejected. Subsequently—

Q. I didn't ask you for a history of events because I am trying to save time, Mr. Wren. It isn't that what you say

(3851)

isn't so. I am asking you whether this picture was awarded to the Randolph, in order to cut through and save time. I am trying to be brief.

A. Yes, sir, it was awarded to the Randolph.

Q. That is the only question. And of course we know that the Randolph—we have had that—is twice the size of the Viking in seats?

A. Yes, sir.

Q. Now, the Randolph, Paramount had had experience, as you know, knowing what the opposition plays, the Randolph had played WHITE CHRISTMAS with Bing Crosby, had it not?

A. Yes, sir.

Q. It is an Irving Berlin picture.

It had also achieved a reputation for playing CAINE MUTINY, which you used the figures of the Randolph for. Do you recall that?

A. Oh, I remember the CAINE MUTINY, sir, but our experience—

Q. All I am asking is if Paramount had had a very successful experience with THE CAINE MUTINY at the Randolph.

A. Paramount wasn't the producer of CAINE MUTINY, it was Columbia.

Q. No, no, I beg your pardon. I am wrong. That was Columbia. I am quite wrong. What I meant to say really was that Paramount—it was common knowledge that THE

(3852)

CAINE MUTINY at the Randolph had as a matter of fact broken a box office record at that theatre, had it not, for Philadelphia?

A. I will accept that, yes, sir.

Q. You say that you have been a subscriber to the trade publications? "Motion Picture Exhibitor" is one of them, is it not?

A. Yes, sir.

Q. Did you ever see this ad announcing the Randolph Theatre first week, highest first week gross ever achieved in Philadelphia? Did you see that?

A. I believe I saw it, yes, sir.

Mr. Nizer: I will offer that in evidence.

(Issue of "Motion Picture Exhibitor" was marked Exhibit D-81 (Paramount) for identification.)

Mr. Nizer: I won't have to read this. May I just hand it to the jury.

(Exhibit D-81 was handed to the jury.)

By Mr. Nizer:

Q. So that it was common knowledge due to these ads and other knowledge that gets around in the industry after a picture has played in a theatre, everybody knows what pictures are playing, that the Randolph, this theatre of over 2,000 seats, had grossed in one week seventy-odd

(3853)

thousand dollars, and it was a subject of a special advertisement, wasn't it?

A. Yes, sir.

Q. And of course we have already had the fact I think that that is more than twice as much as you ever did in that highest week you ever had in this theatre, at the Viking?

A. Yes, sir.

Q. Now, I do not ask you whether Paramount made the right decision in giving this picture to the Randolph instead of you under the circumstances, although I believe so. But that isn't what I am asking you. I merely ask you this: To be fair about it, do you think that Paramount's judgment in awarding THE BRIDGES AT TOKO-RI to the Randolph under the circumstances was at least a reasonable honest exercise of judgment rather than some dishonest conduct on its part? Will you grant that much in all fairness?

A. But with this reservation. According to that ad they should have awarded it to the Fox Theatre.

Q. Well, now, you are not bringing any suit for Mr. Charles Young here, are you?

Mr. Young: I imagine he will some day.

A. Not bringing any suit?

By Mr. Nizer:

Q. Let's leave out the Fox here, because we are not asking

(3854)

you whether they should have given it to someone else.

A. Well, it mentions the Fox did more with THE ROBE.

Q. Yes. THE ROBE once had a higher—

A. The Fox has more seats.

Q. But we don't know whether the Fox put in a bid or what it did for that picture.

A. That is what I say. If they put in a bid they should have gotten that picture.

Q. If they did, but you don't know whether they did.

A. I do not, no, sir.

Q. All right. May we get back to my question?

A. Yes, sir.

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(3855)

Q. I am not asking you to tell me that Paramount was right in giving it to the Randolph, THE BRIDGES AT TOKO-RI. As I say, we think so. But let us assume that reasonable men can differ about these kinds of awards. All I ask you is will you concede in all fairness that the exercise of judgment of Paramount in granting this award to the Randolph Theatre rather than to the Viking was not a dishonest act; by looking at these two bids was at least, right or wrong, an exercise of judgment such as every businessman has to make in these matters? Won't you admit that, that you are not charging dishonesty on this bid?

A. I say this is the third time they have made this mistake. In three pictures—

Q. Would you say on this picture—let's take this picture, is all I ask you—would you say by looking at

(3856)

these two proposals that on its face this shows anything except some exercise of business judgment?

A. I say that it shows out and out discrimination here. The Viking had a bid, a legitimate bid, with a cash guarantee, and should have been awarded the picture.

Q. I know that you claim that, and I know that you differ with the judgment exercised by Paramount, but I am asking you this question: Could there be a reasonable difference of opinion between businessmen as to whether the Randolph, twice your size, which had done a $71,000 gross on a big blockbuster, whereas you had done $34,000, as it turned out, the highest you could get on a blockbuster; could there be a reasonable difference of opinion on that subject? That is the only thing I ask you. I am not even asking you to say they are right or you are right.

A. I don't think—

Q. Could there be a reasonable difference of opinion about that?

A. There could always be reasonable differences of opinion. I think Paramount was wrong.

Q. Yes, I understand, or you wouldn't be here. here.

A. That's right, sir.

Q. But what I am asking you, after saying that they are wrong, is this a matter where business judgment can be different

(3857)

between different businessmen?

A. Certainly.

Q. Isn't that inherent in this kind of enterprise? That is all I am asking.

A. I have said that.

• • •

Q. Mr. Wren, may we not agree that in a business of this character where you haven't got $100 against $80, and where you have all these complicated factors of percentages scaling up and down, and the experience of one theatre, and all these other complicated factors of bids, indefinite runs, three weeks with a hold-over clause, if it reaches a certain figure it is held over, if it doesn't hold over, advertising clause on one side for an extra thousand dollars, on the other side a different kind of advertising.

(3858)

clause—I am not saying that you are bad or you are wrong or you are right. Aren't the factors of this industry when you try to make decisions a matter of business judgment?

A. No, sir, not in these instances.

Q. They are not?

A. Absolutely not; because if they were, the way you have developed this thing, evaluation and everything else, a man makes one mistake, two mistakes. When he keeps making mistakes it can't be as complicated as you would lead people to believe it is.

(3859)

Q. Well, Mr. Wren, your claim of mistakes I will not move to strike out; I ask you the question, but I leave to the jury as to whether there were any mistakes here, except yours, so let us not argue about mistakes.

A. Right, sir.

Q. I am talking about this picture. You are referring to something else. We have gone over each one and we are going to go over each one you mentioned.

A. Right, sir.

Q. We will let the jury decide whether there were any mistakes. I am talking about this bid. I am addressing myself to this picture. Would you in all candor and honesty, whether you want to claim otherwise, if you wish, admit that this is, if anything, an exercise of honest business judgment, right or wrong?

A. I claim otherwise.

Q. Well, let us take a look at your figures, if you claim otherwise. The BRIDGES OF TOKO-RI had a national film rental of $4,300,000; right?

A. I will accept that, sir.

Q. And the Randolph Theatre—going by hindsight now, now that we know what it did—on a $4,000,000 national film rental picture, the Randolph did over thirty more thousand $563. You see it on your own schedule?

(3860)

A. Yes, sir.

Q. Which is somewhat more than the Viking did, not on a four-million picture, but on a six-million national film-rental picture the first week; right?

A. Yes, sir.

Q. You for Viking had offered a guarantee when you went for the Loew picture, STUDENT PRINCE, of $40,000; right?

A. Yes, sir.

Q. And that was a $2½-million national film-rental picture?

A. Yes, sir.

Q. But when you went for the BRIDGE OF TOKO-RI, which is not a $2½-million picture but a 4-million picture, instead of offering 40,000 guarantee you only offered $22,-500 guarantee, didn't you?

A. Yes, sir.

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(3861)

Q. So that you had, talking in terms of confidence, your judgment was wrong in that your confidence in the BRIDGES OF TOKO-RI, which was a $4,000,000 production, was less than the STUDENT PRINCE, which was a $2½-million production?

A. Yes, sir; but there was a—

Q. You were the one who made a mistake; right?

A. But there was confidence displayed, nevertheless.

Q. You were the one who made the mistake, was my question,—

A. No, sir.

Q. —my last one.

A. No, sir.

Q. An error of judgment on your part?

A. We expressed our judgment in the bid.

Q. I know you did.

A. In the guarantee.

Q. I am asking you whether that wasn't an error of judgment. You offer $40,000 for STUDENT PRINCE, it turns out to be a $2½-million picture, you only offer half, virtually, for a

(3862)

picture that is twice as good, as it turned out. That was a mistake of judgment on your part, wasn't it?

A. Yes, sir,—

Q. All right.

A. —but we offered something.

Q. Now, that is all I asked you. I am trying to find out who was mistaken.

And on BETRAYED, a Loew picture, you offered a guarantee of $30,000 and that turned out to be less than a $2,000,000 picture?

A. Yes, sir.

Q. Now, in this computation that you made, and since you talked about a number of mistakes when I asked you only about this picture, haven't you conceded that you made, what is, as I call it, a lot of mistakes, bad ones?

A. Oh, I certainly have made a lot of mistakes; yes, sir.

Q. Now, would you say that if anybody claimed that because you made these mistakes that you were dishonest rather than just mistaken in your judgment, that that was unfair, if somebody accused you, put together all your mistakes—and you said you made a lot, a whole lot—and somebody said, "Therefore, you are dishonest about this matter to your employer," let us say, you would say, "No, whatever I did, I did in my honest judgment; if it turned out wrong, that is

(3863)

inherent in this business"; isn't that so? Wouldn't you answer that way?

A. Not necessarily.

Q. All right.

A. He might think otherwise.

Q. Oh, you are willing to accuse yourself of fraud under those circumstances?

A. I am not.

Q. All right.

A. I am going to abide by his decision.

Q. All right; you will abide, if he thinks you are dishonest?

A. Well, he is the employer, sir.

Q. And if he thinks so you think that would give some weight to it, would it?

A. Well, naturally it would,—

Q. It would.

A. —because he could discharge me or keep me.

Q. I see; all right.

A. Either way, sir.

Q. Now, in considering Paramount's judgment, I have before me—

Mr. Nizer: Give me the box-office statement, please.

(3864)

By Mr. Nizer:

Q. Until they get it, it is true that each theatre keeps a box-office report of the number of admissions per each hour on a picture, does it not?

A. Yes, sir.

Q. So that we can tell by looking at a box-office report how many people went in at a particular hour and were seated in that theatre at a particular show—for instance, in the afternoon, or 8 to 10 at night, 6 to 8. These records are kept with the precise number of ticket numbers and admissions; right?

A. Yes, sir.

Q. Now, in order for me not to take time writing this on the board—and I will just ask it of you and say, "Subject to Mr. Sawyer looking at this"; I will give it to him—on Saturday night of January 22nd, 1955, when the Randolph was playing the BRIDGES OF TOKO-RI, this picture I am talking about, between 8 and 10 o'clock there were 2,353 patrons in the Randolph seated there, were in the theatre at one time, according to that daily box-office report.

You will accept that figure?

A. May I see it, sir, please?

Q. Yes. It is composed—I put a little mark so you can make it out more easily. There is another sheet that goes

(3865)

with that, and you will see them together. It is marked there, too.

May I help you on this? It will save time, because it is a rather complicated series.

A. It is an hourly box-office report. He sold 510 tickets here.

Q. Right.

A. He sold 700 tickets here; he sold 500 tickets here; and he sold 200 tickets here and 194 tickets here. There is nothing complicated about it, sir.

Q. All right.

Now, look at this.

A. Well, he sold 410 tickets here and 731 here.

Q. Well, I don't want you to read off the figures, sir. I am trying to save time. Will you concede that between the hours of 8 and 10 on that date, with the ticket numbers, there were 2350 tickets at that theatre for that engagement?

A. Between 8 and 10?

Q. That is right.

A. No, sir. I don't see that total here. You got 5 and 2 is 700.

Q. May I take this now? Let me read it off.

* * * *

(3866)

Q. Let us read it into the record. You looked at the wrong place. All right.

Now, I am going to give this to you in a moment to check, but let me read it into the record while I am here.

At 7 P. M., at 9—put it across here— there were 700 tickets; right?

* * *

Q. And 500—that is 1200.

• • •

(3868)

Q. 700, 510—

Mr. Nizer: Is that exact?

By Mr. Nizer:

Q. Oh, 500, 700 and 500 on these two lines which I am going to mark for you. I will show it to you in a minute. That is 1200. And there are 410 and 733 on the next sheet.

Now, total those together first and then I will show it to you. How much is it?

A. 700 and 500 on—that is 1200. Why are there two sheets, sir?

Q. And 733 and 410. Total them.

A. 1143.

Q. No, the two of them together.

A. Yes, sir.

Q. You see—

A. I am talking about the last two figures you gave me.

Q. No—and the first two.

A. And the first two? That is 2343.

Q. That is what I said, 2343 together.

Now, let me—one other question and then I will give this to you.

The Randolph has two box-office windows where you take tickets?

(3869)

A. Where they take tickets?

Q. Where they sell the admission tickets. You know what I mean, don't you? Two windows to sell tickets.

A. Yes, sir.

Q. At the Randolph.

A. Yes, sir.

Q. That is why there are two sheets, you see.

A. Right, sir.

Q. One report and the other—

A. Right, sir.

Q. Now I am going to ask you to look at these four figures at the two windows on the same hour of that day and tell me if we won't agree.

Mr. Sawyer: That is two hours, isn't it?

Mr. Nizer: Two what?

Mr. Sawyer: I thought you said it was two hours.

Mr. Nizer: Two—

Mr. Sawyer: Two hours, didn't you say?

Mr. Nizer: It is the one show; that is right—here.

By Mr. Nizer:

Q. To save time, may I point it out to you, please?

A. I see that. I can read one of these.

(3870)

Q. All right.

A. All right; 8 P. M., 500 people; right, sir?

Q. Yes.

Then 700?

A. Between 8 and 9 P. M.

Q. That is right.

A. I mean, this is 700—7 P. M. This is—

Q. 7 and 5, these two, the same figures I just gave you.

A. Yes, but you mentioned 8 and 10, sir, and now you are giving me 7 and 8.

Q. No. Here are the figures. No. I am giving you these figures, see, 9 and 10?

A. Well, why should they be changed? Here is the hourlies out here, sir.

Q. Will you take these figures and tell me what they are at that particular show.

A. Yes, I will tell you that it indicates 500 tickets were sold at 8 P. M. here—I mean, at 9 P. M. here, and 700 were sold—500 were sold at 8 P. M. and 700 at 7 P. M.

Q. No, no.

A. Yes, sir. It says 8 P. M. to 9 P. M. there.

Q. You just said 7 P. M.

A. Look, Mr. Nizer, is that 7 P. M., 700 tickets? Isn't that?

(3871)

Q. No; you see the number "9" written in here?

A. I also see "7 P. M." written in here.

Q. This is a printed form and they wrote in for 9 o'clock—now, we are not going to argue about that, are we?

A. Yes. I am going to argue about it. It is 7 here and it is 9 there. I am going to argue; yes, sir. It says 700 tickets between 6 and 7 o'clock.

Q. Mr. Wren, then I will take it at 7. Take the printed instead of the correct figures written down 9 and 10; let us take 7 and 8 instead of 9 and 10. How much is it?

A. 7 P. M., up to 7 P. M., they sold 700; between 7 and 8 they sold 500.

Q. That is 12?

A. Yes, sir.

Q. Now, look at the next box-office report. Do you want to take the actual hours written in or the printed form that is on it? Which do you want to do?

A. I want to take the printed form, sir.

Q. All right. Take the printed form for the same.

A. No, 733 at 7 P. M. and 400 at 8 P. M.

Q. All right; and what is that all together—2353?

A. 2343, which means they had 200 people standing.

Q. All right. Now, that is where we started.

A. Yes, sir.

(3872)

Q. So that all I asked you was, before we did all this, is it a fact that the Randolph at one show at that occasion had 2343 people in the theatre at one time, as you have just added, a couple of hundred standing?

A. Yes, sir.

Q. Now, if that picture had played at your theatre, at the Viking Theatre, your seats at the Viking are 1,117?

A. Yes, sir.

Q. It is obvious that at that show, no matter how the picture did on Monday or Tuesday or Wednesday, at that show you certainly couldn't accommodate 2343 people, could you?

A. In two hours? No, sir.

Q. At that one show, the two hours.

A. No, sir.

Q. And the box-office take for each patron is how much on this show, total price, at your theatre?

A. The box-office? I didn't understand you.

Q. The ticket price. What is the ticket-admission price?

A. Depends on the attraction.

Q. Well, this says $1.25. Will you accept that?

A. I believe at the time that is what the Viking was charging, sir.

Q. Yes. I am not quarreling.

A. No. I am just answering.

(3873)

Q. Just answer my question.

A. I thought you asked me, sir.

Q. All right. Then just answer. It is a dollar and a quarter. So if assuming for the sake of argument, without splitting hairs, that there were a thousand more people, roughly, that could get into the Randolph at that show than could get into the Viking Theatre, that would be a

difference of over a thousand dollars on that one show in intake, wouldn't it, on that show?

A. It would be $1250, sir.

Q. All right.

Now, each of these box-office reports—you do the same—reports the weather, doesn't it, tells you what kind of weather it was?

A. Yes, sir.

Q. And I read to you the report here from both of the box-office sheets, from both windows. It was cold that night. You will accept that? I don't expect you to remember.

A. I would say it was cold at both windows.

Q. I would say it was.

Now, I ask you, if people had to wait outside at your theatre, they would have had to wait in the cold, even if there was a line; isn't that so?

A. Oh, yes, sir.

(3874)

Q. Incidentally, the lobby at the Viking Theatre is exceedingly small, isn't it?

A. The outer lobby?

Q. Yes.

A. Yes, sir.

Q. Yes. I mean the outer lobby.

A. Yes, sir.

Q. If you have an overflow of—how many people would have to stand on the outside instead of being in the outer lobby?

A. Out on the sidewalk?

Q. How many people could be in the outer lobby?

A. Oh, in the outer lobby, very few, sir, because of the fire regulations.

Q. Well, I mean, how many?

A. Well we don't let them stand out there, to begin with. In the inner lobby?

Q. Yes.

A. 250, 300 people.

Q. And in the outer lobby none?

A. No, sir.

Q. And the Randolph Theatre has a large outer lobby, has it not?

A. Fairly large; yes.

(3875)

Q. Where people can stand if they have an overflow?

A. Yes, sir.

Q. Without being out in the weather?

A. Yes, sir.

Q. The outer lobby of the Randolph Theatre can accommodate several hundred people, can it not?

A. I would say so.

Q. Now, without going through this, will you, again subject to check, so we don't have to do it the way we did it before, accept the computation that taking up such peak hours during the first week of TOKO-RI from January 20th to 27th, 1955, we find that the attendance at the Randolph during those peak hours were in excess at any particular time of 1,170 seats, the seats at the Viking Theatre, by 4,418 people in one week, which translated into admission dollars would be $5,699? Will you, subject to check, sir, so we don't have to do this longhand, at least, accept that?

A. Well, that I would want to check; yes, sir.

Q. All right; we will check it later. Will you accept it subject to check?

A. How many people, please?

Q. 4,418.

A. And how many hours? These are the peak hours on what date?

Q. These are the peak hours. We will give it to you.

(3876)

A. All right, sir.

Q. If you want to check it, I will give it to you.

A. All right, sir.

Q. Take it subject to check for the present.

A. Yes, sir.

Q. And translate that into film rental on your terms of your bid—you will check this, too; just let me give you the figures—it would have been not $17,000, but $14,433, a difference of $3,000 in film rental paid to Paramount. Now, subject to check, I will assume you will accept that.

A. I will not, sir.

Mr. Sawyer: What does that mean, "he claimed"?

The Witness: I won't accept that, sir.

Mr. Nizer: I didn't say he claimed. You don't hear me.

Mr. Sawyer: All right.

By Mr. Nizer:

Q. If you find that it is 4,418 people—and I will give you the calculations, without doing them, to save time to the Court—and if you subtract the 5,699 which those admission tickets involved, from the first week's receipts of 34,563.73, which is the figure you put in your schedule, the admission receipts would have been, according to your own calculation,

(3877)

28,865. Those are the figures I want you to check.

A. Yes, sir.

Q. And if the admission receipts had gone down from 34,000 to 28, in round figures, the film rental would have been affected from 17 to 14,000 on your own calculation. Now, subject to check, these figures work out this way. That is all I am telling you, and you will check that.

A. Yes, sir.

Q. You will accept it unless you find an error.

A. Yes, sir.

Q. Correct? And, of course, what you did here, to be clear again, is that you took the $90,000 box-office receipts at the Randolph Theatre, the 2,000-seat theatre—

A. Yes, sir.

Q. —and you assumed that you would have reached the same $90,000 in order to make your calculation?

A. Yes, sir.

Q. That is what it is; and you assumed that you would have reached it in how many weeks?

A. Five weeks.

Q. So that you would have reached the same gross of 90,000 in exactly the same time as the Randolph, according to your calculation; right? That is how you did it?

A. Yes, sir.

(3877a)

Q. Now, turn to Twentieth Century-Fox, your various demonstrations there. BETWEEN HEAVEN AND HELL. Now, this is a picture—

A. Will you wait just a moment, please?

Q. Yes.

A. Yes, sir.

(3878)

By Mr. Nizer:

Q. This is a picture which played from November 9 to the 19th; is that right, at the—

A. 9th through 20th, sir.

Q. At the Fox Theatre?

A. Yes, sir.

Q. 9th to 20th?

A. No, through 20th.

Q. 9th through 20th?

A. Yes, sir.

Q. And this was four days within the period of this suit, 9th, 10th, 11th, and 12th?

A. Yes, sir.

Q. Because your suit was instituted on the 13th.

A. Right, sir.

Q. So you have, nevertheless, for the purposes of this computation, taken the whole income?

A. Yes, sir.

Q. (continuing) At the Fox Theatre for your purposes, have you not?

A. Yes, sir.

Q. And not limited yourself to the first four days which are within the period of this suit?

A. That is right, sir.

(3879)

Q. Now, the Viking offer on this picture was, no guarantee; this is to Twentieth Century-Fox?

A. Yes, sir.

Q. Your offer to Twentieth Century-Fox was, no guarantee, and an indefinite run to a ten thousand dollar hold-over?

A. Yes, sir.

Q. Advertising to be mutually agreed upon?

A. Yes, sir.

Q. And then you had a scale of percentages.

I just want to show it to you, the scale of percentages.

Mr. Young: You can have mine.

Mr. Nizer: Thank you.

By Mr. Nizer:

Q. Again, I do not want to go into them, I just want to show their complexity. On the whole sheet, running up three, four, five, about twelve or fourteen columns, different percentages for different amounts, anticipating whether it will do $8000, $13,000 business, $16,000, $18,000, whatever it is, the percentage shifts from 25 to 27½ per cent, to 30, to 32½ per cent.

This is the complicated schedule that you submit as the terms which you will pay if you get this picture. Right?

A. Yes, sir. But I don't see it is complicated.

(3880)

Q. Well, by "complicated" I mean it is divided into many segments and no one can tell in advance which segment will be reached. So if you try to anticipate what the gross will be or the film rental, being Twentieth Century-Fox, why, you can't tell from this what figure you will reach. If you could tell you wouldn't give all this scale.

A. Not the figure I can reach, but the scale itself is not complex, no, sir.

Q. All right. If you are a good mathematician, very well, it is not complex. But that point is that you yourself don't know how this picture will come out in these different gradations or you wouldn't put them all down. If you knew you would just say one per cent for this amount. This is scaled on the theory that no one knows how this picture will do, and at different amounts it shifts even by 1½ or two per cent; you figure it all out different percentages.

A. Yes, sir.

Q. And then at the bottom I notice you have another thing, which I will call complicated, maybe it is even to you, unit bases.

A. Yes, sir.

Q. Saturday and holidays, 3/10, Sunday, 2/10, each other day 1/10.

Now that means that you allow for a Saturday

(3881)

the same weight as if it were what, three days?

A. Yes, sir.

Q. And for Sunday the same weight as if it were two days?

A. Yes, sir.

Q. And each other day a tenth.

A. Now, it wasn't complicated, was it?

Q. Well, let us not argue.

A. All right, sir.

Q. So that the week is weighted, as the accountants would call it, so that each day isn't given the same value in determining all this?

A. You indicate preferred playing time this way, sir. Saturday is preferred, Sunday is preferred.

Q. And by preferred you mean that you allow for each unit a different value depending upon whether it is Saturday, Sunday, or a Monday to Friday?

A. Or a holiday, surely.

Q. Or a holiday.

Now, the Fox Theatre, which also negotiated or bid for this picture, similarly had a scale, a sliding scale of different amounts and different percentages to some degree. For example, they went from 25 to 50, and then 20 to a certain sum. I won't read them all. To me they are complicated. But different values put down for different amounts. You know that?

(3882)

A. Is that the standard Fox scale?

Q. I don't know what is standard.

A. Because Einstein would have trouble with that one.

Q. All right. Now, then you will agree it is complicated?

A. Oh, that one is, yes, sir.

Q. In other words, you are the fellow who submits a simple one and the Fox Theatre is the Einstein complicated?

A. That is the complicated one, yes, sir.

Mr. Nizer: Let me see the Fox bid for a moment.

By Mr. Nizer:

Q. It just looks like this. I won't even go through it.

A. Oh, please do.

Q. Mr. Wren, please let us save some time—

A. Right, sir.

Q. —in this courtroom too, you know.

A. Right, sir.

Q. Now, suppose that Twentieth Century-Fox, the distributor company, sincerely thought—just assume this with me, sincerely thought that the Fox Philadelphia Theatre, which has 2422 seats; that is what, roughly two and a half times? No.

A. Two and a third.

Q. Two and a third times as large as the Viking?

A. Yes, sir.

(3883)

Q. Suppose that the Twentieth Century-Fox Company thought that that was an advantage in licensing its picture, and even though this is contrary to your view; you don't think that those 2422 seats are an advantage. You have told us that.

A. Yes, sir.

Q. But do you recognize that a distributor executive would have a sincere and honest conviction to the opposite effect, namely, that seats have something to do with it. Do you think that that is at least something which there can be a difference of opinion about? That is all I ask you now.

A. I believe there can be a difference of opinion, yes, sir.

Q. In other words, you wouldn't charge them with dishonesty if they thought that the seat factor was an important factor in their determination. I don't say you agree. But you wouldn't charge them with dishonesty for doing so, would you?

A. No, sir.

Q. Now, similarly, if the Twentieth Century-Fox Company thought, contrary to your view, which I know—

A. Yes, sir.

Q. —that location of a theater is important, and, further, that the Fox Philadelphia Theatre, which is situated at 16th and Market, was according to them a better location than the Viking at 19th and Chestnut, you would recognize that such a view could be an honest and sincere opinion of a businessman,

(3884)

even though you differ with it?

A. Yes, sir.

Q. You wouldn't say that anybody who thought so was dishonest in his judgment?

A. No, sir.

Q. Now, in this case, you again take the entire receipts that the Fox Philadelphia Theatre achieved on this picture over a period of two weeks—

A. Not two weeks, sir.

Q. Pardon?

A. Eighteen days—I mean twelve days. I am sorry.

Q. The 9th through to the 20th, you say it is twelve days?

A. 9 to 16 is seven, 17 to 20 another four days, sir, eleven days.

Q. Eleven days. You took all of those receipts at the 2422-seat Fox Theatre—

A. Yes, sir.

Q. —and assumed for the purposes of the calculation you made that you would have done exactly the same at the Viking?

A. Yes, sir.

Q. You bid for this picture BETWEEN HEAVEN AND HELL and the Fox Theatre won that picture, they got the award from Twentieth Century-Fox?

A. Yes, sir.

(3885)

Q. Now, the very next picture you bid for and the Fox Theatre bid for, but you won the award, didn't you?

A. Which next picture?

Q. TEENAGE REBEL, the very next.

A. I didn't know it was the very next picture, but we got TEENAGE REBEL, I will accept that. I didn't know it was the very next picture.

Q. Well, I will show it to you. Look at the date.

At the same time—not only the next, at the very same time that the Fox Philadelphia Theatre was playing BETWEEN HEAVEN AND HELL, which is November 9th to 20th, I will give you the dates so we can save time I hope, you between November 6th and 13th, part of that very same period, were playing the Fox picture TEENAGE REBEL; right?

A. Yes, sir.

Q. So that in this case Twentieth Century-Fox had two pictures in a row. You and the Fox Philadelphia Building bid for both. They won one and you won the other, and you were both playing a Twentieth Century-Fox picture during the same period of time, overlapping, right?

A. Yes, sir.

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(3886)

Mr. Nizer: Your Honor, we have attempted—Mr. Sawyer has cooperated—to stipulate something which I think will save the time of cross-examination on another subject. I interrupt for just a moment.

It is in connection with Mr. Wren's testimony that the suits by the various film companies for film rental were filed on a certain time, on the same day. We have subpoenaed the records from the courts of these suits. The clerk is here. We have shown them to Mr. Sawyer and we can now stipulate, so I don't have to cross-examine him about it, that the records show the following:

The suit by Universal Film Company for film rental against the Viking was filed and instituted July 20, 1956.

The suit by Twentieth Century-Fox for film rental against the Viking was instituted August 8, 1956.

The suit by Loew's for film rental against the Viking was instituted August 14, 1956.

The Viking filed the present suit on November 13, 1956, which is over 90 days after the last suit by Loew's was instituted and 116 days after Universal.

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(3887)

By Mr. Nizer:

Q. At the recess, Mr. Wren, we had reached the point at which you had acknowledged that on two pictures here of Twentieth Century-Fox your bid was rejected in favor of Twentieth Century-Fox on one and the Fox Philadelphia Theatre's bid was rejected on another Twentieth Century-Fox picture in favor of the Viking, and you both played, the Viking and the Fox Theatre, played these two Twentieth Century-Fox pictures virtually opposite each other, overlapping some of the period.

Do you remember that? We agreed on that.

A. Yes, sir.

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(3888)

Q. Now, if you will look, or will you accept this subject to check so we don't have to waste time, on these two pictures, these two Twentieth Century-Fox pictures, one of which was awarded to the Fox Philadelphia and one to the Viking,—

A. Yes, sir.

Q. —on which they bid the first week of the one that they played, HEAVEN AND HELL, was $15,000 round figures receipts. Do you see that?

A. Yes, sir.

Q. And the amount you grossed on the picture you played was about half, $7800?

A. Yes, sir.

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(3889)

Q. You took their higher figure by twice as much at the 2422-seat Fox Philadelphia Theatre in order to make your calculation instead of assuming that the Viking, as you did, would have that, instead of taking the figure you did take on the Twentieth Century-Fox picture which played at the same time, $7800, right?

A. I have said that, yes, sir.

Q. Now, the next Fox picture which is involved is called THE BEST THINGS IN LIFE ARE FREE. There were other offers there, bids, the Studio, but to save time again, I am trying to move on, and I will just compare yours with the Fox quickly, yours and the Fox Philadelphia Theatre.

You gave no guarantee. Fox Philadelphia gave no guarantee, right?

A. Yes, sir.

Q. You gave two weeks. Fox Philadelphia gave three weeks,

(3890)

right? And you have a holdover of $8500. They have a holdover to be mutually agreed upon, a complicated clause. I will call it a clause about holdover. I won't go into it. So that you have two weeks minimum and they have three weeks minimum. Both had holdover clauses, right?

A. Yes, sir.

• • •

(3891)

Q. Well, again subject to correction—I will be glad to change it if I find otherwise—but these are my research of the records.

A. Yes, sir.

Q. So the Viking bid a week less it turned out than the Fox bid. That is a better playing time on the Fox Theatre's side, is it not?

A. Well, as it turned out—

Q. To that extent?

A. As it turned out, the Viking would have had to play it three weeks because of the holdover figure.

Q. I know, but that isn't a commitment. I am not talking about what happens. So far as the commitment to Twentieth Century-Fox is concerned, the Fox Theatre had an edge over you in what it offered by one week, right?

A. Yes, sir, yes, sir.

Q. So there is no guarantee and they have a little better playing time. Let's put it that way.

A. Right, sir.

Q. Now, just to make it clear to Mr. Sawyer and you, the Fox offer is a minimum run of three weeks as guaranteed. It
is very clear, you see.

(3892)

A. Right, sir.

Q. All right. Now, the percentages. Once more we have a variation of a whole series of percentages. The Viking bid has 50 per cent the first week and 40 to 50 and so on. The Fox Philadelphia is 40 to 50 the first week, 30 to 50, 25 to 50, 20 to 50, and all sorts of ramifications. So I will assume that that is a Mexican standoff for rough purposes.

A. Yes, sir.

Q. Of course no one knows what the picture will do in advance.

A. Except on the first week. The Viking minimum, 50 per cent.

Q. Yes.

A. The Fox is 40.

Q. 40 to 50.

A. Yes.

Q. 40 to 50.

A. Yes, but a minimum of 40.

Q. Yes.

A. Right, sir.

Q. But then we have advertising clauses, and if we put that in, I think I will demonstrate that to you a little later, if I have to. The Fox Philadelphia advertising clause is far

(3893)

more favorable to the distributor, the company I represent, than yours. Would you not agree with that generally, without going into the details?

Mr. Sawyer: Do you have your advertising figures there?

The Witness: No, no.

Mr. Nizer: Take a look at them.

Mr. Sawyer: I think he ought to see them. And the Foxe's.

(Documents were handed to the witness by Mr. Sawyer.)

By Mr. Nizer:

Q. In order to save time I am not going to make a thorough analysis of each to try to persuade you or otherwise. Just answer the question, and I will take it either way.

Do you agree that the Twentieth Century-Fox had before it two advertising clauses and that the Fox Philadelphia Theatre was a more advantageous clause from the viewpoint of the distributors than yours, or will you not agree?

A. No, I won't agree to that, sir.

Q. All right, then, let's leave it alone.

Now, on its face, without deciding which is better—

(3894)

A. Yes, sir.

Q. —even though they have three weeks and you have only two weeks, these are comparable offers, are they not, except for the differences that may exist in the theatres? So far as the terms are concerned, these are comparable offers, aren't they? Wouldn't you say that?

A. Well, the Viking's is 10 per cent better the first week.

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(3895)

Q. Haven't you used the word "comparable" in your deposition?

A. Oh, I may have, certainly.

Q. What is that?

A. I say I may have.

Q. Didn't you give a meaning to the word "comparable" in your testimony?

A. I don't remember. I may have.

Q. If you may have, what do you consider the word "comparable" to mean, since you used it? You yourself use it in this industry. What does it mean to you?

A. Well, you compare things.

Q. Not only compare them, but the two things are close enough so that they are deemed comparable. You can't compare the Empire State with a one-story building. You could compare them but they wouldn't be comparable, isn't that so?

A. That's right.

Q. Didn't you use, for example, during my examination, you said, "Well, the Midtown was comparable with the Viking because of the seats"?

A. I may have.

Q. "May have"? You may have also—

A. I don't know, sir. You are asking me. I don't honestly

(3896)

know. If I said it, I said it.

Q. All right.

Now may I ask you—but wait for a moment for counsel—would you be good enough if counsel does not object to answer whether you consider these two offers, forgetting the differences between the theatres, would you consider these two offers comparable?

Mr. Sawyer: I don't object, Your Honor. We might as well get along.

Mr. Nizer: All right.

A. Surely.

By Mr. Nizer:

Q. Surely. All right. And, therefore, if they are comparable, whatever decision Twentieth Century-Fox made with respect to this matter is an exercise of business judgment between two things that let's say are just close, whether one is a little better than the other or the other is better, let's even assume that there isn't much difference. One way or the other that is a business exercise of judgment, isn't it?

A. Yes, sir.

(3897)

Q. And you are not charging Twentieth Century-Fox and the fact that it gave this particular picture to the Fox Philadelphia any more than it gave you the TEENAGE REBEL the other way, you are not charging them with any dishonesty in that judgment, are you? Right or wrong, it was an honest exercise of judgment, in your judgment, isn't it?

A. Yes, sir, in this instance.

Q. All right.

Now, let us take the fact that immediately after this picture which we are on now, this is called BEST THINGS IN LIFE ARE FREE,—

A. Yes, sir.

Q. —it is the next Twentieth Century-Fox picture, and that was awarded to the Fox Philadelphia Theatre?

A. Yes, sir.

Q. That is the one you made a comparison of?

A. Yes, sir.

Q. Now, isn't it a fact that the very next picture, THE LAST WAGON, of Twentieth Century-Fox, was awarded to you?

A. I know I had THE LAST WAGON. I am looking at the play dates.

Q. October. I will give it to you.

A. I got it.

Q. Got it?

(3898)

A. Yes, sir.

Q. October 16th to the 23rd, 1956; correct?

A. Right, sir.

Q. And once more the play dates of these two pictures happened to be almost identical. Let me give you the dates. The Fox Philadelphia Theatre was playing the Twentieth Century-Fox picture, THE BEST THINGS IN LIFE ARE FREE, on October 16th to 23rd,—

A. No, sir.

Q. —and you were playing the—

A. No, sir.

Q. No?

A. I hate to disagree with you. It was 19 to 25, sir.

Q. What is it?

A. The Fox was playing THE BEST THINGS IN LIFE October the 19th to the 25th, the first week.

Q. Well, that is quite so—I gave that date before—October 19 to August, and you were playing October 16th

to the 23rd, overlapping THE LAST WAGON, another Twentieth Century-Fox picture, so that both theatres had Twentieth Century-Fox pictures playing at the same time, part of the same time; right?

A. Yes, sir.

Q. And to be fair about it, you would—I will ask you the

(3899)

question—you don't claim—I will leave out "to be fair about it"—you don't claim that because the Twentieth Century-Fox gave you THE LAST WAGON, that that means they discriminated in your favor against the Fox Philadelphia Theatre; it was just a case of judgment there, too, wasn't it?

A. Well, I don't know how the Fox could have played them both at once, sir.

Q. Nor you; you couldn't play them both.

A. No, sir; so it stands to reason that he—

Q. Now, certainly, without even looking at the terms for this deal, this is about as fair an arrangement, as it worked out, one here, one there; one here, one there, right, on these four pictures by the Twentieth Century-Fox?

A. On four pictures?

Q. Yes, two there and two here.

A. Yes, sir.

Q. All right.

Now, the next Twentieth Century-Fox picture is LEFT HAND OF GOD, and here I think I can save time if I put a figure or two on the board.

The Viking: This is LEFT HAND OF GOD.

This is a picture, incidentally, with Humphrey Bogart, is it?

(3900)

A. Yes, sir.

Q. The Viking Theatre; and this is the Mastbaum here. That is the Stanley Company's Mastbaum; right?

A. Yes, sir.

Q. That was later torn down; correct?

A. Yes, sir.

Q. And this is 4,300 seats, and yours is 1,117 seats; correct?

A. Yes, sir.

Q. Now, you gave a guarantee on this picture of how much?

A. 27,000—but I think it was twenty-seven five, sir.

Q. No. 27.

A. 27 is right?

Q. You were right.

A. Right, sir.

Q. And the Mastbaum gave a guarantee of 30,000; right?

A. That is what we are contesting, sir. At the time the bids were due, the Mastbaum gave nothing.

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(3901)

Q. There is some dispute, you say, about the dates, but forgetting dates, since you made a comparison, we won't go to other subject matters of other grievances.

So far as the guarantee is concerned, theirs was 30,000, no matter when they gave it, and yours was 27; right?

A. Yes, sir.

Q. And now the terms: 90/10 over $5300, yours?

A. Fifty-three fifty.

Q. Well, all right; again that means that the first $5,350 that comes in goes to you, the Viking, and the Twentieth Century-Fox Company doesn't get a cent until you get that; right?

A. That is right, sir.

Q. So that you come out at least even before they can get a nickel; right?

A. If it grosses that much; yes, sir.

Q. Yes. Well, you certainly would expect it to gross at least five thousand, wouldn't you?

A. But if it didn't, then I couldn't get the first fifty-

(3902)

three fifty.

Q. And then they would get nothing, too?

A. That is right, sir.

Q. So that you come out even if it grosses five thousand, you are on velvet after that, but the Twentieth Century-Fox Company starts getting its receipts from that moment; right?

A. Yes, sir.

Q. And the distributor was to pay all advertising?

A. Yes, sir.

Q. And now, of course, that is a disadvantageous clause to the distributor and a good one to you. I am not—

A. Not on a 90/10 deal.

Q. I am not criticizing it, but that is what it is, isn't it?

A. No, sir, not on a 90/10 deal.

Q. Well, all right; I won't quarrel with you. You think the fact that the distributor has to pay for all the advertising is not a disadvantage to the distributor; instead of sharing it between you and the exhibitor. you think this is not disadvantageous?

A. Not when he is taking 90 per cent over a house allowance; no, sir.

Q. I am not talking about how it may work out later. I am saying that the clause that the distributor pays all the advertising is worse for the distributor than a clause that says

(3903)

that the exhibitor and the distributor share with each other on advertising. Which is better for the distributor now?

A. Depending on the terms.

Q. I am giving you the terms. Which is better for the distributor?

A. This is comparable to anything accepted.

Q. Which is better for the distributor?

A. Just what I said, sir.

Q. Is it better to have for the distributor if he must pay a hundred per cent of all advertising costs or is it better if the exhibitor pays a part of it?

A. Depending on the additional terms.

Q. You won't answer that any other way?

A. No, sir. I will not.

Mr. Sawyer: Mr. Nizer, do you object if Mr.—the witness has before him the two bids?

Mr. Nizer: No, sir. I don't.

Mr. Sawyer: His own and the Stanley Warner?

Mr. Nizer: It is all right.

By Mr. Nizer:

Q. Now, instead of 90/10 over fifty-three fifty, the Mastbaum had a percentage deal for the first two weeks, 40 and 50; the third week, 35 per cent to 50—these are percentages—

A. Yes, sir.

(3904)

Q. —and so on all the way down, 30 and 50, and thereafter 25 to 50, and then the fifth and sixth week; but so far as the Mastbaum was concerned, the first dollars that came in the Twentieth Century-Fox got a share of. It didn't have to wait until 5,000 or any other sum was deducted first. That is the difference between these two offers?

A. There is another difference.

Q. Oh, yes.

A. They have no—

Q. I am not saying there aren't. There are lots of differences.

A. Yes, sir.

Q. I am just trying to give you a few.

A. That is one difference; yes, sir.

Q. And that, too, is an advantage to the distributor to have a straight percentage deal instead of this, if the picture doesn't run very long; if it runs very long the 90 per cent may turn out to be better; right? These are the unvariables in this industry?

A. They are variables; yes, sir.

Q. And these are the matters which men who deal with them have to decide, make a decision, an informed guess, let us say, in advance of the events? It requires judgment and guess to some extent, doesn't it?

(3905)

A. Yes, sir.

Q. How a picture will do?

A. Yes, sir.

Q. Incidentally, Twentieth Century-Fox had a very large advertising campaign with Humphrey Bogart in this, didn't they? They thought this was going to be a very big picture?

A. Yes, sir.

Q. Nationally?

A. Yes, sir.

Q. It turned out not to be?

A. Yes, sir.

Q. So there we are—that is this industry.

Now, advertising here, the record shows—and I will show it to you in a minute—that there was paid by the Mastbaum $4,000 towards the advertising—I will give you the exact sum—and the Stanley, the Mastbaum paid that, and Twentieth Century-Fox paid 3,792. So for rough purposes they split the advertising expense between them, Mastbaum paying $600 more.

Now, accept that for a moment. I will give it to you if you want me to prove it to you, but accept it for a moment. Will you?

A. I will accept those figures; yes, sir.

Q. Yes; so that as far as advertising is concerned, clearly

(3906)

the Mastbaum offer was better than yours, wasn't it?

A. No, sir, because they have no advertising clause in this bid, so how can a man evaluate the advertising?

Q. Well, where there was no advertising clause in the bid itself, it is the practice, is it not, to mutually agree? Haven't you done that?

You have done the same thing, haven't you, advertising to be mutually agreed upon, or nothing said, and you later agree?

A. I have never been able to do it. If I say, "mutually agreed," yes, but if there is nothing said, I haven't been able to do it.

Q. I am not talking about what you are able to do. Here are the facts. This is the way they later agreed. Let us assume that for a moment, so I get away from when it was in the bid or not.

A. Yes, sir.

Q. And I am just asking you whether this is a more favorable arrangement to the distributor than this on the advertising alone. Won't you agree to that?

A. If he knows that at the time the bids are submitted, it would be more favorable,—

Q. Well, you made—

A. —but he didn't know that.

Q. Well, you made him know in advance—

(3907)

A. I certainly did.

Q. —that the distributor would pay a hundred per cent?

A. That is right.

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(3908)

Q. Now, here we have a guarantee that is higher than yours; right?

A. Yes, sir.

Q. And wouldn't you say that these—without deciding which is better than the other and in a precise way, because they are a different category of deals, wouldn't you say that these are comparable in a general way?

A. In a general way; yes, sir.

Q. And haven't you told us where two offers are comparable and the guarantee is higher, that the award should be made to the fellow who gives the higher guarantee?

A. Yes, sir.

Q. And, therefore, would you agree that this award to the Mastbaum was correct on that, on those facts that I have just given you?

A. Just on those two facts only, sir.

Q. Yes; all right; then so can we cross this out from the comparison?

A. No, sir.

Q. You won't agree to it?

A. Because the bid was not in on time.

Q. Oh, assuming that the bid was in on time.

A. Assuming, yes, sir, that they had the bid in at 10:30

(3909)

in the morning.

Q. Wait. Listen to my question. I am taking your assumption.

A. Yes, sir.

Q. Assuming that the bid was in on time,—

A. Yes, sir.

Q. —would you then cross this out as a comparison which proved—

A. Yes, sir.

Q. All right; isn't it a fact that in your Loew contracts where you had no clause on advertising that you later divided fifty-fifty on your advertising?

A. In the Loew contracts were depending on the deal. On the 90/10 deal we were assured that we would not have to pay any difference.

Q. Mr. Wren, I am sorry to interrupt you, but will you answer my question and not tell me about very different deals.

A. No, sir. It is not so.

Q. I asked you a simple question.

A. No, sir. It is not so.

Q. Well, let me ask it and then I will—then you can answer it. Isn't it a fact that in Loew contracts with the Viking where there was nothing said about advertising in the contract, that later you divided those deals in some instances

(3910)

Q. And you took an even figure of $7000 and you just estimated, right?

A. Yes, sir.

Q. Now, the records that were available to you gave you the exact figure, did they not?

Mr. Sawyer: No, they did not, Mr. Nizer. That is why we have given you this instance.

Mr. Nizer: Well, you have answered for the witness, but I will let it go at that.

By Mr. Nizer:

Q. The same records—

A. Pardon, I just want—

Q. There is nothing before you. Now, in addition—

A. I just want to show you—

Q. Do you want to ask me a question now?

A. No, I want to explain to you where we got the figure. The figure that was made available was the $3792.

Q. But you didn't know about the forty-three 0—

A. No, sir, we did not.

Q. I see. Well, the same document, the same kind of documents that gave you the exact figures in the other instances that you put on the blackboard were available to you in this case, weren't they?

A. No, sir.

(3911)

Q. Well, we won't quarrel about it. I will now give you the figure. Will you accept it or do you want me to show it to you, the $4302: instead of the estimate of seven, it turns out to be $8185, and, of course, the special billboard advertising which you estimated yesterday at $1400—do you remember that? I will take that round figure. So will you write that down.

A. Yes, sir, but—

Q. $8185, plus the $1400, that is, $9585.

A. No, sir, you gave me the figures $8095, it comes to.

Q. Eighty-one—

A. You gave me $4302 and $3793.

Q. No, it isn't that much, it is $8185 and $1400.

A. Well, that doesn't apply.

Q. That is, special billboard.

A. That doesn't apply, sir.

Q. What is that?

A. It doesn't apply. If there is an $8000 campaign the billboard comes out and then you have $7000 additional.

Q. No, I am talking of your offer.

A. I am talking about our offer.

Q. Didn't your offer require the special clauses of the billboards, the signs, that we estimated yesterday cost $1400?

A. Yes, sir, but in an advertising campaign—

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(3912)

Q. Isn't it a fact that in addition to the $8185, which is the advertising figure, which I now give you precisely, instead of your estimate of $7000—do you understand that far? We are together on that?

A. Yes, sir, I have said that.

Q. You are willing to correct that $7000 now that I have given you the exact figure of $8185, aren't you?

A. Yes, sir.

Q. Now, I am asking you whether in addition to that your offer in this case, your bid, didn't provide for the special billboard signs, let us call it that, which, as you totaled yesterday, came to about $1400.

A. Right, sir.

Q. Therefore, had you received this picture there would have

(3913)

been added to the regular advertising of $1400 for the special clause of the billboards and signs?

A. No, sir.

Q. Would there not?

A. No, sir.

Q. Would it have changed your contract, your offer? Do you mean that you would have changed your offer after you made it?

A. No, sir.

Q. Well, in order to save time, I won't even quarrel about that. Let us take your $8185 and correct that figure.

A. Right, sir.

Q. And then your conclusion in this case as to the difference in film rental is wrong, isn't it, if you put in the correct figure instead of the wrong one?

A. It comes to $27,501, am I right, sir?

Q. It comes to what?

A. By deducting $8185 from $35,686—

Q. Well, you don't have to go through all those. I am trying to save time again. I ask you whether your conclusion of the difference of film rental that you would have paid, your conclusion in this statement which you gave to the Court, is wrong.

Mr. Sawyer: Ask him what it would have been. Let us check it, subtract it, and see.

(3914)

By Mr. Nizer:

Q. Well, you had $2479.90 on your sheet.

A. Yes, sir.

Q. Now, if you make the correction of $1185 that becomes what?

A. $1294, sir.

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Q. And that is so even after you have taken the Mastbaum

(3915)

gross and assumed that you would have done that at the Viking Theatre, of $66,000, right?

A. I can't assume that on the advertising, sir.

Q. You know that the Mastbaum didn't use those special billboards that you provided for, don't you?

A. Advertising budgets are set up so that if the budget is $8000 everything is put in it.

Q. You haven't answer my question.

A. I don't know what the Mastbaum used on that, no, sir.

Q. You don't know that the Mastbaum doesn't use billboard?

A. I didn't know whether they did on this, sir, or not. The Stanley Warner Theatres have used billboard.

Q. Do you know whether the Mastbaum—don't you know that the Mastbaum didn't use billboards?

A. No, on this particular picture I don't know whether they did or not. They could have.

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(3931)

Q. With respect to United Artists, I am going to that now. There are several pictures of United Artists you made comparisons of and I shall take GENTLEMEN MARRY BRUNETTES as the first one.

A. Yes, sir.

Q. Now, you have testified, have you not, at this trial that meeting an availability date that the distributor sets is a most important factor in the distributor's determination to award the picture to one as against the other?

A. May I have that again, please?

Q. Yes. You have testified, have you not, that when the distributor gives an availability date the fact that an exhibitor can meet it approximately is a most important factor for the distributor in determining whether he should grant that award?

A. Yes, sir.

(3932)

Q. In other words, you recognize the right of the distributor on his own picture to say, "I would like to play SUMMERTIME in the summertime or WHITE CHRISTMAS in the wintertime," or to pick a date for an Academy Award purpose or anything else. He decides the approximate date of availability and one of the factors that he has a right to take into consideration is whether the theatre can meet that availability or cannot for any reason, good or bad, right?

A. Yes, sir.

Q. Now, in this case—and I am now referring to GENTLEMEN MARRY BRUNETTES—you advised the distributor that you could not meet his availability date and you submitted another one than the one he requested, right?

A. I believe that is right, yes, sir.

Q. The difference was not just a few days but it wasn't an approximate date even that the distributor gave. You have given us that testimony?

A. Yes, sir.

Q. As a matter of fact, you had a conversation with the distributor about that, United Artists in this case?

A. Yes, sir.

Q. And United Artists told you—it was a perfectly friendly discussion—that they were having a world premier in Chicago on GENTLEMEN MARRY BRUNETTES and therefore

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they couldn't give the date you wanted because it would precede the world opening in Chicago. Do you remember that?

A. I don't recall that, sir. It may have been.

Q. It may have been. In any event, not ascribing any wrong or impropriety to either side, this was a situation where because of your bookings or some other reason you couldn't play the picture on the availability even approximately that United Artists gave. That was the situation that United Artists had at the time on this picture, correct?

A. Yes, sir.

Q. Now, before I go into any calculations on your demonstration, would you say, even aside from any calculations, that this alone justified United Artists in rejecting your bid on this picture, even irrespective of terms? You couldn't meet the availability date for probably good business reasons and so they turned in other directions. Wouldn't you say that that in itself eliminates the necessity for all this comparison in this case, to be perfectly candid about it?

A. It could.

Q. All right, then I will be doubly brief. I think we can save time.

On your demonstration of this picture, in ad-

(3934)

dition to what we have just gone over, you failed to take into consideration the advertising clause of both bids, did you not?

A. Yes. We indicate here "Advertising figures not available."

Q. Well, now, in this proceeding—

Mr. Nizer: May I have answers to interrogatories 5, 6 and 7 of United Artists.

By Mr. Nizer:

Q. In this proceeding I suppose you working with your attorney at the time, but in any event your attorney asked us for the advertising and we supplied it in writing as far back as 1959. And here it is. We gave you the exact information as part of, you know, the pretrial proceedings under His Honor's direction so as to speed this case up and get through with all these details.

A. Yes, sir.

Q. And we supplied the distributor's share of advertising on GENTLEMEN MARRY BRUNETTES, $2,880.60, on page 4. So it was available right in your own lawyer's office.

I won't press the matter further. Let us say that it was an oversight on your part in not using it, all right?

Mr. Sawyer: Mr. Nizer, I think what we would

(3935)

like to see is the other part.

Now, maybe we got it, but if we just have the distributor's share we don't know what the total was. There are about four cases here, and they are all Stanley. Do you see what I mean?

Mr. Nizer: I see what you mean.

Mr. Sawyer: We had only one side of it, so we haven't the full amount.

The Witness: Is that the distributor's share, sir?

Mr. Sawyer: I don't believe we have it, unless we just couldn't find it.

By Mr. Nizer:

Q. What was that?

A. Is that the distributor's share?

Q. Distributor's share. And this is a 50-50, so you did it in other cases, but I will not quarrel. I will take Mr. Sawyer's explanation for it. That is half. So make that calculation now. I will supply it to you now anyhow. It isn't exactly half. Let me correct that. It is in accordance with the sliding scale which comes close to half. You know, wherever the scale goes 40 to 50 or 38, you take for that week that percentage of the advertising. You know how it is done, a proportion of the scale.

(3936)

A. Yes, sir, I do.

Q. All right. Now, the amount comes out roughly—let's take half because it came out that way. So you can multiply that by two and you will get the exact—

A. $5,761.20, sir.

Q. Fifty-six, I think it is.

A. Fifty-seven, sir.

Q. All right, let's take the rough figure.

A. $5,761.20.

Q. Now, without my going through the calculations, now that you have that figure, that would eliminate the entire difference on your own calculation if you had the figure before you—whether you want me to demonstrate it to you here, will you take it subject to a chance for your counsel to check—

Mr. Sawyer: It would eliminate the difference.

Mr. Nizer: It would?

Mr. Sawyer: It would eliminate the difference.

By Mr. Nizer:

Q. Now may we then agree that unless you find a correction on these figures, which I will give to counsel, that even forgetting the fact that you didn't have the

(3937)

availability you would be willing to eliminate this comparison on the ground that if you had had advertising figures correctly there would have been no differential except in favor of the bid that the Mastbaum gave?

A. Yes, sir.

Q. All right.

A. Not the Mastbaum, sir.

Q. Then we will cross that one.

Now, then, I can skip quickly to SUMMERTIME. Here again, without reviewing all the cross-examination which we have already had on this subject, I just want to use it as a factor for consideration.

This was a picture, SUMMERTIME, with Katherine Hepburn, you remember, and Rosanno Brazzi?

A. Yes, sir.

Q. Where a schoolteacher goes on her vacation.

United Artists chose to put this out August 3rd, in the summertime?

A. Yes, sir.

Q. And you recall that you, for whatever reason—again I am not ascribing any evil purpose—that you couldn't play this picture until September?

A. Yes, sir.

Q. Do you recall that?

(3938)

A. Yes, sir.

Q. And of course we do know, due to people coming back from vacation and so on, that August is a very good theatre month, motion picture month these days, these years,

and that September is quite a bad one. Isn't that so, comparing August and September?

A. Oh, sure.

Q. That is true, isn't it?

Now, then, again forgetting calculations for a moment, in view of your admission on this—and I will not read the record because we have been all over it—is it not true that United Artists had a reasonable and correct position in its own judgment in saying, "Irrespective of some differences of terms, if this theatre cannot play this picture on or about the availability of August, and we want to play it right in the summer, that we must reject its bid and turn to somebody else who will play it August 3rd, open it August 3rd or thereabouts, within a day."

Actually it opened August 2nd, as it actually happened.

Now, you will in the same way as on the previous picture, GENTLEMEN MARRY BRUNETTES, you will admit that that is a reasonable position on the part of the distributor when he gives an availability and the exhibitor

(3939)

can't meet it, correct?

A. Yes, but there was no discussion. The only difference here was there was never any discussion with regard to any availability.

Q. No, I didn't say that. I understand. They just rejected it.

A. Right.

Q. In this case they didn't tell you about a world opening or anything.

A. Right.

Q. They just said, "We want it August 3rd. We can't take your September date." Is that right?

A. There was no discussion at all about the availability.

Q. All right, no discussion, but you didn't meet the availability, right?

A. Right, sir.

Q. And according to your own testimony, I think you said that if you were a branch manager and an exhibitor—I think you even said if you were a United Artists branch manager—and an exhibitor couldn't meet the availability date, you certainly wouldn't give it to him. Do you remember that?

A. I was a United Artists branch manager and we couldn't meet the availability date, certainly don't give it to him?

(3940)

Q. You don't recall it?

A. No, sir.

Q. Let me read it to you. Page 1686.

A. Right, sir.

Q. Of the trial notes of this case.

This, incidentally, was in respect to this very same picture we are talking about, namely, SUMMERTIME.

A. Yes, sir.

Q. Q. "If you were United Artists," I said.

You said, "Yes, sir."

Q. I would not care to release the picture to any exhibitor who could not play it on availability, for the reasons given.

Did you make that answer?

I was quoting you from a deposition.

You said:

I certainly did.

Q. So if you were the branch manager of United Artists—

A. Yes, sir.

Q. —and you received a bid from a theatre like the Viking—

A. Yes, sir.

Q. —that expected to play it after NOT

(3941)

AS A STRANGER, in September—

A. Yes, sir.

Q. —the 20th—you would turn him down, wouldn't you?

A. But the deal I accepted was—

Q. Just answer the question before "but."

A. I would turn it down.

Did you make those answers?

A. Yes, sir.

Q. So you will stand by what you said?

A. Yes, sir.

Q. Now, is it therefore necessary to even go into the calculations which we challenge? Can we not agree and save some time that that whole calculation is unnecessary because it was reasonable for United Artists to reject your bid because of this availability situation, was it not?

A. Yes, sir, but it was also, as I have since indicated, sir, reasonable for United Artists, who was the distributor of the picture that I was then playing, NOT AS A STRANGER, to discuss the matter with me and say, "Take off STRANGER and put on SUMMERTIME."

There was no discussion. They rejected the offer and awarded it to the Goldman Theatre.

Q. Well, in the first place you would have wanted to

continue NOT AS A STRANGER instead of playing this, wouldn't you, in view of the—

A. Well, by August 3rd I had my money out.

Q. Well, your grievance, then, if we call it a grievance, if we will dignify it by that word, comes down to the fact that it would have been a little more courteous if United Artists had had an additional conversation about it? Is that—

A. Plus the fact that I guaranteed the money.

Q. Yes, but we are not talking about guarantee. You see, you take me off the track. You have already agreed, haven't you, that it was a reasonable business exercise of judgment—

A. Yes, sir.

Q. —which you yourself would have made if you were United Artists, to turn down the Viking Theatre under the circumstances, right?

A. Yes, sir. I have said that, yes, sir.

Q. I think under those circumstances I will not take you through your calculations. I will go right on to AMBASSADOR'S DAUGHTER.

Now here in the case of AMBASSADOR'S DAUGHTER, that is the third United Artists picture. Your offer was one week in a guarantee. You guaranteed one week, and you had an indefinite run with percentages, 50 per

(3943)

cent the first week and a whole series of percentages which I will not repeat. Is that a correct summary of your offer?

A. Yes, sir.

Q. Whereas the Randolph, which got this picture, AMBASSADOR'S DAUGHTER, had two weeks with varying percentages on a sliding scale.

You see that, too, don't you?

Mr. Nizer: May I have 202, please.

A. They didn't bid on the picture, sir.

By Mr. Nizer:

Q. Let's again stay away from the difference between bid and negotiate. As a matter of fact,—

Mr. Nizer: May I have the invitation in this case?

By Mr. Nizer:

Q. In this case—I am sorry I am drawn into this bypass, but let's settle it.

In this case you refused to bid. You wanted to negotiate, correct?

A. I may have, yes, sir.

Q. You see, "may have" doesn't progress us any distance.

A. Well, I don't recall, sir. If that is what I did, that is what I did.

Q. That's right.

(3944)

A. Yes, sir.

Q. Then after you refused to bid, you negotiated and submitted a certain proposal, right?

A. Probably right, yes, sir.

Q. And the proposal I read you have told us is the correct one?

A. Yes, sir.

Q. Now, therefore, the Randolph also negotiated just as you negotiated?

A. Right, sir.

Q. So you have no grievance to bring that subject up, certainly at this time, have you?

A. No, sir.

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Q. Now, in your proposal you used the words "Indefinite

(3945)

run." What did you mean when you proposed in your negotiation an indefinite run? What did that mean to you when you made it?

A. I said an indefinite run with a minimum of seven days, right, sir? So the least I could possibly play it is seven days.

(3946)

Q. Well, the way you put it is—I don't want to quarrel about words—you said, "one week guarantee." It is even clearer.

A. Yes, sir.

Q. One week guarantee. But you said, "indefinite run." Now, what did that mean to you when you made that?

A. Then there would be a discussion about taking it off in the event that I wanted to.

Q. A discussion?

A. Yes, sir.

Q. And who would have to agree as to whether you could play it two weeks, three weeks, four weeks?

A. Well, the distributor, naturally.

Q. In other words, if you both didn't agree, it was a commitment for only one week?

A. Yes, sir.

Q. "Indefinite run" then does not mean to you that the distributor can decide how long it is to play, if he can take it off; you say it means you both have to agree—

A. Mutually agree.

Q. —on when it comes off?

A. Yes, mutually agree to keep it on or take it off, one of the two, as opposed to determination of the distributor.

Q. I see; there is only one thing isn't clear yet about

that answer. Are you telling me that the word "indefinite" run as you proposed it meant that you were committed to only one week that you guaranteed and you were not committed to a second or any other week, unless both the distributor and you agreed?

A. Surely.

Q. It wasn't in his power to say, "You keep running it until I am tired of this engagement because it is not bringing in enough"; that wasn't his right under your offer?

A. Certainly it was. I said we discuss it and if he says to me, "Keep it on," and he would give me the reasons for the thing, I would naturally be obliged to keep it on.

Q. But what you—

A. I have to agree with him on some score on this thing.

Q. I understand. That would be a mutual discussion.

A. Yes, sir.

Q. My question is that unless you both agreed, your commitment was only one week?

A. Yes, sir. I said that.

Q. All right; now, the Randolph commitment was two weeks, wasn't it?

A. I believe that is what you said, sir.

Q. Yes. It is in the record, sir, and we have it.

Now, then, under those circumstances, you,

(3948)

nevertheless, in making your calculation on AMBASSADOR'S DAUGHTER took three weeks of the receipts at the Randolph Theatre, which is twice as large as yours, and assumed that you would have made exactly the same receipts for three weeks at your theatre?

A. Yes, sir.

Q. And in doing that, of course, you were anticipating that you and the distributor would agree, despite the fact that there is no commitment on your part, to play it two more weeks; you were making that kind of an assumption as well?

A. Well, they certainly wouldn't have to coax me, if you gross seventeen thousand in the first week, to play it a second, sir.

Q. I am not asking you about coaxing or what would have happened, except to say, that the Randolph, when the distributor was acting upon these different offers, didn't know whether it would play one week or more at your theatre; he had a commitment of one week at that time before he knew the results; right?

A. Yes, sir.

Q. But with the Randolph he had a commitment of two weeks before he knew the results, didn't he?

A. Yes, sir.

(3949)

Q. And that is an advantage to the distributor, isn't it? Clearly it is, is it not?

A. But this man didn't keep his commitments.

Q. No, not that. Please start with an answer, and then I will even listen to the "but." That is clearly an advantage to the distributor, isn't it?

A. May I have it again, sir?

Q. Where his commitment to United Artists is for two weeks and your commitment is for one week, that is an advantage to the distributor, isn't it?

A. Yes, sir.

Q. Now, if you—

A. Now may I continue?

Q. Now, if you took for the sake of assumption your minimum commitment of one week and reconciled these figures according to that, assuming that you had done that in your calculation, then, of course, the difference in film rental would have been wiped out, wouldn't it?

A. Yes, sir.

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(3950)

Q. If you took it for one week, even assuming that you would have done what the 2,000-seat house at the Randolph did, if you did it for one week, instead of paying a film rental of 11,649, you would have paid 8,485? Do you want to figure it out on your terms?

A. I have got it figured up.

Q. Applying your terms; right?

A. I have got it figured out, sir.

Q. It is 8,485; right?

A. $8500; right, sir.

Q. 85; all right.

And the Randolph paid how much film rental?

A. 6788.

Mr. Sawyer: Yes.

By Mr. Nizer:

Q. For what?

A. For one week.

Q. How much did United Artists receive for the engagement

(3951)

that you yourself put down here for three weeks? But let us take two weeks, which was its commitment. How much is that?

A. Two weeks?

Mr. Sawyer: Well—

By Mr. Nizer:

Q. Yes. I will do it either way—two or three. We will do it both.

Mr. Sawyer: I thought you were going to compare first weeks, one week.

Mr. Nizer: Well, there was a commitment of two weeks, Mr. Sawyer. Why don't you permit us to continue and then you can ask any questions you wish, if you think this is unfair.

By Mr. Nizer:

Q. How much would it have been for two weeks, the film rental?

A. At the Randolph Theatre it would have been $10,266.

Q. Which was the commitment definitely and for one week, which was your definite commitment, comparing it, it would have been $8500?

A. Yes, sir . . .

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(3952)

Q. I am not going to enter your commitments on this proposition as to whether you kept them and I want to go into anybody else's. I am asking you not that kind of judgment or discretion of integrity of operation, because that is not a subject I care to go into on these comparisons.

My question is: Under the commitment that the Randolph had for two weeks and the commitment of one week, if you compared those two even in hindsight, and even assuming that you would have done what the Randolph gross is, your film rental obviously for that period would be less than the Randolph paid?

(3953)

A. On one week against two, naturally, it would be less.

Q. Naturally; and that was what the terms were that United Artists had before it before the picture played, wasn't it, on commitments?

A. Yes, sir.

Q. All right.

Now, United Artists also had some experience, prior experience in your theatre. One was with a blockbuster, a six-million picture, NOT AS A STRANGER, and the other was with a very weak picture, a $480,000, the DESERT SANDS, so I am going to take both of those out as not typical, but they also had very similar pictures, as evaluated by national film rental in hindsight, as you have been doing here, as AMBASSADOR'S DAUGHTER. I am going to take three pictures that United Artists had experience at your theatres with.

AMBASSADOR'S DAUGHTER had a film rental of 951,000, national film rental. Let us call that for rough figures a million. All right, sir?

A. Yes, sir.

Q. And you played COMANCHE, which is a million thirty-two thousand, didn't you?

A. Yes, sir.

Q. Of United Artists; and you played RUN FOR THE SUN, which

(3954)

is a million-dollar picture for United Artists; correct?

A. I am not sure about RUN FOR THE SUN. Is that right?

Q. RUN FOR THE SUN.

Mr. Steinberg: 209.

Mr. Nizer: Slightly. I have taken round figures. I have taken more for AMBASSADOR'S DAUGHTER, too.

By Mr. Nizer:

Q. So that here are three pictures which in hindsight on national film rental are about the same, and applying the terms of your offer of AMBASSADOR'S DAUGHTER, United Artists having had experience with pictures of this class in your theatre, your film rental, if applied to COMANCHE and RUN FOR THE SUN, to prior United Artists pictures, would have been between five and $7,000 less than your computation on AMBASSADOR'S DAUGHTER, would it not?

Will you accept that, at least,—

A. Not until—

Q. —subject to check?

A. Not until I know when—when was AMBASSADOR'S DAUGHTER bid, please?

Q. Well, what would the date have to do with that?

A. Well, the time I bid on AMBASSADOR'S DAUGHTER, I had not played—

Q. Oh, yes; you had. I assure you of that.

(3955)

A. RUN FOR THE SUN?

Q. Yes. I am giving you the dates. I am giving you—you can take my assurance that I have given you only two prior pictures. I am not taking later ones. I would have liked to. I have limited myself to what United Artists could have had in its records and in its minds at the time it was considering AMBASSADOR'S DAUGHTER. These are prior pictures of United Artists.

A. But I didn't finish, sir, with RUN FOR THE SUN. Here this opens 8-29. I finished RUN FOR THE SUN on 8-28. So I certainly must have bid on it before that, sir.

Q. I am not talking about—

A. Much before.

Q. —I am not talking of when you bid. I am talking of the result from your theatre on similar pictures which United Artists had in its possession at the time it was considering your bid.

A. But they wouldn't have that in the possession, sir. That is what I am trying to tell you.

Q. You think it is too close.

A. They wouldn't have RUN FOR THE SUN.

Q. All right; then—

A. They opened the day after I closed RUN FOR THE SUN.

Q. All right; take COMANCHE.

(3956)

A. Right, sir.

Q. It would have been 7,000, roughly, less film rental, if you applied the AMBASSADOR'S DAUGHTER'S terms than your calculations as to what you would have done. Will you take that subject to your checking, so we don't have to wait at this moment?

A. Surely.

Q. All right; and now will you agree that one of the factors which a distributor has a right to consider in determining a bid offer of any exhibitor is what experience it has had on similar pictures at that exhibitor's theatre? I think you have once testified to that, have you not, that you agree with that?

A. Yes, sir; but I don't think you can compare the performance of COMANCHE with the cast in AMBASSADOR'S DAUGHTER, sir.

Q. Now, take BAREFOOT CONTESSA. There we have another one of those availability situations, and again maybe we can cut through all this blackboard business.

United Artists made that picture available for October 29, 1954. Will you agree with that, sir?

A. Is that the availability? Yes, sir.

Q. And when you put in your proposal you said that you would submit a December date instead of an October date; do you recall that?

(3957)

A. May I see it?

Q. And I show it to you. You said playing time December and they gave you an October date; right?

A. Yes, sir.

Q. And they wrote you in that case, didn't they, or advised you? I think they wrote you.

A. I am not certain about that, sir. May I see that? This was—

Q. What, see this?

A. No. I saw that. I would like to see their advice.

Q. Well, I will see. I am not sure I have it in front of me.

A. See, this was prior to my time.

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(3958)

Q. In any event, then, without going through it all over again, this is another situation like the two we had before, GENTLEMEN MARRY BRUNETTES and one other where you, if you were a United Artists—and SUMMERTIME—if you were a United Artists branch manager and you put out a picture for October and the exhibitor said, for any reason at all—I will assume it is a good reason—"I will make you this offer, but to play December," the distributor would have a perfect right in your judgment, as you testified, to reject that proposal, wouldn't he?

A. Yes, except that it isn't as October. This is practically November availability, sir. So it is a one-month difference—

Q. Yes.

A. —that he has to weigh as against the guaranteed money. They put up a guarantee of forty—

Q. Yes; but he had the right, if he doesn't want to shift his date from October 29th to sometime in December, on your own testimony?

A. He always has that right, sir.

Q. But it would be a reasonable exercise of his judgment to do so, according to your own testimony?

A. Yes, sir.

Q. In view of that, I will not take you through the calcula-

(3959)

tions, but I will ask you one question and drop it.

In your calculations that you put on the board, I believe, you took as the playing time of BAREFOOT CONTESSA at the Midtown Theatre 1, 2, 3, 4, 5, 6, 7, 8—9 weeks; 2, 4, 6,—9 weeks; is that right?

A. No, sir—8 weeks and 4 days.

Q. 8 weeks and 4 days. Yes. There is a day's difference. There are 4 days there. That is right.

And you assumed—you took that whole gross and assumed that you would have had it; correct?

A. Yes, sir.

Q. Now, actually, under the terms of your offer, you wouldn't have played that picture if you applied the terms of your offer to even the Midtown grosses, assuming your method, because you had a holdover clause that would have stopped you on December the 14th—no, on December the 1st to the 7th, because there the receipts at the Midtown, which you are assuming was 8,000, and you had a holdover clause of 8500; is that correct?

A. But I said I couldn't open until December, so it would be a better playing time.

Q. Better? Isn't pre-Christmas the worst time of the year?

A. It just says "December," sir.

(3960)

Q. Yes; doesn't "December" mean that it could very well be pre-Christmas?

A. Certainly; but you are committed with the—

Q. And isn't that—answer my questions.

Mr. Sawyer: Do you mind if he has this? He wasn't there at the time. You don't mind if he looks at it?

Mr. Nizer: No. He can look at it.

By Mr. Nizer:

Q. Will you just answer my question before you analyze something. Isn't pre-Christmas, if December worked out to pre-Christmas, the very worst theatre week, the happiest week of the year, but the very worst theatre week of the year?

A. Well, now, we will just go with the Viking grosses.

Q. No, no, no; answer my question without going to any place. Can't you answer that question as a theatre man?

A. Yes, sir,—

Q. If you can, answer it.

A. —but the Viking Theatre opened December the 14th at $17,432 with THE LAST TIME I SAW PARIS.

Q. Now, will you answer my question. Didn't you say "yes" to my question?

A. I said, "Yes, sir.

Q. All right; that is all I want from you, sir. Now, going

(3961)

back to my other question, if you had applied the terms of your deal, which had an $8500 holdover—you see it there? Counsel put it in front of you. Correct?

A. Yes, sir.

Q. And if you will look at your own calculations, which you also have in front of you, you wouldn't have reached, even if you assumed the Midtown grosses, which you are doing—you wouldn't have reached $8500 at the week of December the 7th, would you? You wouldn't, would you?

A. I am committed for five weeks.

Q. Yes.

A. Right, sir.

Q. And you might as well tell me your age.

A. No.

Q. Will you now answer my question.

A. No. The bid here is the first five weeks. Now, that means I am committed for five weeks.

Q. No doubt.

A. All right, sir.

Q. I haven't challenged your statement. Now, don't tell me any irrelevant facts. Listen to my question.

A. This is not irrelevant.

Mr. Sawyer: This is not an irrelevant fact.

(3962)

By Mr. Nizer:

Q. It certainly is, and I don't want to move to strike it out, but I want to ask you this question.

Haven't you made perhaps an innocent error in assuming that you would have played nine weeks and taken the entire Midtown grosses when under the terms of your deal you would have been stopped by your own terms on December the 7th if you had applied it to these figures?

A. No, sir. I couldn't have stopped before the 14th on applying of your figures, sir, to this bid.

Q. Well, that is what I mean, the 14th.

A. Well, you said the 7th.

Q. In other words, you would eliminate the last two weeks? Let us be—

A. No. I would eliminate eleven days, sir.

Q. Eleven days?

A. Yes, sir. It only played seven and four more, sir.

Q. No, no, no.

A. 15 to 21 is one week, and 22 to 25 is another four days.

(3963)

Q. You would eliminate—

A. The last eleven days, which is sixty-four hundred—

Q. Pardon me, sir, if we must do it, then let us do it correctly and see if we can't agree.

A. Yes, sir.

Q. If you had followed the terms of your own offer you would have eliminated the playing time of the Midtown, whose figures you took, from December 22 to December 25; that would be one item you would have to eliminate, wouldn't it?

A. $1207.

Q. And the week before you would have had to eliminate, from 12/15 to 12/21, $5263.

A. I said that, sir.

Q. So that you would have—those are the two that you would have had to deduct, which makes a total of how much?

A. $6470.

Q. So that you would at least be willing, would you not, right now, to correct the figures of your computation to that extent, that $6000, wouldn't you?

A. $6470, yes, sir, on the gross.

Q. All right. And your film rental, you can do a little calculation or you can accept my figures and check it later. Your film rental for seven weeks would have been $45,387,

even assuming that you would have done exactly what another

(3964)

theatre did?

A. Yes, sir.

Q. As compared with the gross at the Midtown—with the film rental at the Midtown of $47,000.

A. Pardon me? What was that?

Q. $47,320.

A. What was the $45,387, how many weeks?

Q. If you had—after the correction—

A. Yes, sir.

Q. —which you have just agreed to make your film rental would have been $45,000, in rough figures, I won't give you the dollars—

A. Right, sir.

Q. —as against $47,000, which was paid by the Midtown, correct?

A. Yes, sir.

Q. And the entire difference that you demonstrated by your calculation was $654.97, which under that correction is completely wiped out, is it not?

A. Yes, sir.

Q. And you want to eliminate this under the correction?

A. No, sir, because at the time—

Q. All right, you have answered it.

Mr. Sawyer: No.

(3965)

Mr. Nizer: You have answered it?

The Witness: No, sir.

Mr. Sawyer: No, he hasn't. Let him answer it.

The Witness: Because at the time United Artists was looking at bids this was the one they had to look at, the Viking Theatre. They had no bid from the Ran-

dolph Theatre on this picture, sir. I mean the Midtown Theatre. And he says he didn't bid on the picture.

By Mr. Nizer:

Q. Isn't this one of these situations we have been over before?

A. Yes, sir.

Q. Do we have to go back that it was a negotiation, that you made an offer and they made an offer?

A. No, sir. He says he—

Q. And so far as this is concerned haven't you even at the outset of my questioning conceded that United Artists, without any of these figures, had a right to reject your proposal if they had no offer from anybody, because you wouldn't meet the availability date?

A. I said—

Q. That is all I am asking you.

A. —that, sir.

Q. All right, then let us stop there, sir.

(3966)

Now let us go to Loew's. Let us start with GUYS AND DOLLS at Loew's. In making your demonstration on the blackboard you made it solely between the Viking and the Randolph, Goldman's Randolph; do you recall that, sir?

A. Yes, sir.

Q. Now, you know, don't you, that the Mastbaum, the Stanley Mastbaum, also put in a bid for GUYS AND DOLLS against Goldman's Randolph and against you; you know that, don't you?

A. I don't recall that, no, sir.

Q. Never mind. If I give it to you as a fact will you accept it, sir?

A. The Mastbaum bid on GUYS AND DOLLS?

Q. That is right.

A. As well as the Viking and Randolph?

Q. That is right. The Mastbaum, Stanley's bid, the Goldman Randolph bid, the Viking bid.

When I say bid, I want to correct that, because I am using the word not in its technical form. There were negotiations, offers submitted by all three. We won't get into what is a bid against a negotiation, bid, and so on,, a negotiation offer, but there was a Mastbaum proposal in writing. Will you accept that or do I have to show it to you?

A. May I see it, please?

Q. All right. Stanley Mastbaum proposal in writing.

(3967)

I am not going to ask you to examine the terms, because I am not going to go into that. We are not engaged in that controversy at this time. I just want you to admit that they made a written proposal too, and they lost it. Right?

A. Yes, sir.

Q. And they lost it in favor of the Goldman Randolph Theatre. In other words, Loew's had your proposal, Stanley's proposal for the Mastbaum, Goldman's proposal for the Randolph, and it awarded it to the Randolph.

A. But they never advised me on this picture who they awarded it to, sir.

Q. Mr. Wren, whether that be a wrong or not, I am not interested in subsequent advice. I don't think I have to cross-examine you about the subject that there is no duty on anybody's part in a negotiation to tell you; it is a courtesy if they wish to; you see them every day, when you go around the film row, don't you? Don't you see these managers almost daily?

A. Well, then why do they do it as a business practice, sir?

Q. Listen to my question: Do you go around to the film row every day?

A. Yes, I said I go around to the film buildings.

Q. And you see these people regularly?

A. Yes, sir, I do.

(3968)

Q. And they talk to you and tell you in advance that they have heard that this picture is now going to be awarded to so-and-so, whether they write you or not; don't you get this information regularly on all negotiations?

A. On this picture, no, sir. I may have heard it at a later date, yes, but not on this picture.

Q. All right.

A. They never called or anything else.

Q. All right.

Now, wait a minute, Mr. Wren, you once took that back. You once said that they didn't tell you and you admitted it was wrong when I faced you with some cross-examination on this.

A. Then, sir, I would like to hear it.

Q. Page 1609:

So when you testified—and I am quoting your words in the Universal deposition, the Universal case—

A. Right, sir.

Q. (continuing) "I am still waiting to find out who got the picture," that was wrong, wasn't it?

A. I am still waiting an official communication—

A. Yes, sir.

Q. (continuing)—as to who got the picture, yes.

Q. That is not what you said.

(3969)

A. No, it is not, no, sir.

Q. And what you said is wrong, isn't it?

A. Yes, sir.

A. Yes, sir, about the official communication.

Q. So you once took back this proposal that they didn't notify you and merely tried to offer the explanation that it wasn't an official notification, and even that you said was wrong and took it back, didn't you?

A. No, sir, I have never been officially notified about GUYS AND DOLLS.

Q. So you were notified, but not officially, is that it?

A. They have never sent me a letter.

Q. Listen to my question. You were notified, but not officially; is that what it comes down to?

A. I heard, but I was never notified officially.

Q. Didn't you say that you were? Wasn't the meaning of this that you got a notification, but you didn't get an official communication?

A. No, sir, I heard the way you indicated, on the street, that it was awarded to Goldman's Randolph Theatre. I was never told by any executive of Metro.

Q. Doesn't your own expense voucher show that you had dinner with the Loew's representative, Formato, on the day that this picture was awarded to the Randolph?

(3970)

A. I may have.

Q. Not may have, you did, didn't you?

A. Well, did I? Let me see the expense account.

Just because I had dinner with him doesn't mean that he said to me: Guess what, the Randolph is getting GUYS AND DOLLS. We may have discussed fifteen other things that day, sir.

Q. In other words, you are now telling us that even though you meet with the Loew's representative on a picture as important as GUYS AND DOLLS, on the very evening that the award has been made, you neither inquired so far as you can recollect and he never told you as far as you can recollect; is that what you are telling us?

A. He says he has nothing to do with the picture, it is the producer's representative. Now, how would he be the man to tell me anything?

Q. Mr. Wren, all I asked you is, you would know, when the producer's representative decided whom to give the mo-

tion picture to, the man who would be notified would be Formato, wouldn't it?

A. It might be Mr. Formato and it might be Mr. Ripps, who also came to see me, about this picture.

Q. It might be a dozen other people in line?

A. Yes, sir.

(3971)

Q. But Mr. Formato would be one of them very likely, wouldn't he?

A. Yes, sir, and so would Mr. Ripps.

Q. All right, and then you had dinner with Mr. Formato.

A. I don't know whether I did or not. I may have had lunch or dinner with him, yes, sir.

Q. On the very day that this picture was awarded have you any recollection that you didn't ask him: How have I come out on—

A. No, sir, I did not.

Q. All right. Now coming back. You see, this is all an excursion because of what you volunteered about this.

We now have the fact that the Mastbaum made a written offer and it was rejected, and the Goldman won it against Stanley Warner and won it against you. Now I ask you this—

Yes, I have to go back to something. I have here an office memorandum of a phone call to you that you didn't get this picture. I wanted to know whether this refreshes your recollection on that subject. Take a look at it.

Mr Sawyer: Your Honor, this is objectionable. Mr. Nizer has this memorandum that has not been sent to the witness. He should show it to him and not characterize it.

Mr. Nizer: I think I should have. I agree with that. I wanted to see if it would refresh his recollection.

The Witness: But this is ridiculous.

(3972)

Mr. Nizer: What is that?

The Witness: I say just because he writes a note to himself saying he advised the following people, that he automatically contacted me, just because he says so I will not go for that, no, sir.

By Mr. Nizer:

Q. This is dated September 16, 1955.

A. Is that the day I had lunch with him?

Q. No. I am not saying it is, Mr. Wren.

Are you telling us now that on September 16, 1955, Loew's representative on a document of his own office wrote down the names of various people that he called to tell about GUYS AND DOLLS, that this is something that you will not accept as a true document?

A. No, I won't accept it, sir.

Q. All right, all right, I understand.

Now, prior to GUYS AND DOLLS you had been awarded by Loew's nine pictures in a row, with the exception of one picture, IT'S ALWAYS FAIR WEATHER, so that you had played nine Loew's pictures successively, there being an interspersal of one picture from a non-defendant company called Allied Artists.

A IT'S ALWAYS FAIR WEATHER, sir, I never played IT'S ALWAYS FAIR WEATHER.

(3973)

Q. No, I don't say you did, I said you got nine in a row except for IT'S ALWAYS FAIR WEATHER, a Loew's picture. You got nine Loew's pictures out of nine that came down for availability, that you, of course, went for.

A. Except for a lot of other Loew's pictures.

Q. That you didn't have any interest in.

A. That is right, sir, but you said only one.

Q. There was one that you bid for—I am trying to give you the advantage of it to be fair about the facts. Of the

pictures you bid for you got nine out of ten. One that you did go for was not awarded to you.

A. Right, sir.

Q. And the very next picture that Loew does not give to you and does not give to Stanley Warner, who is trying to get it, but gives to Goldman at the Randolph Theatre, that is the picture that you had this demonstration on the blackboard after getting nine in a row from Loew's?

A. The nine of them wouldn't make this, sir.

Q. I am asking for the fact, after getting nine in a row this is the one that you now make your demonstration that you should have had, correct?

A. Yes, sir.

Q. Now, the Randolph played this GUYS AND DOLLS picture fifteen weeks. You put that on the blackboard, did you not?

(3974)

A. Yes, sir.

Q. And the box office receipts for these fifteen weeks were $351,000 at this theater which is twice your size; correct?

A. Yes, sir.

Q. And then when you made that calculation on the board you said that you could do in sixteen weeks what the Randolph did in fifteen weeks; do you recall that?

A. Yes, sir, we assumed that.

Q. And do you recall that there was comment at the time back and forth between you and your own counsel that he was skeptical that you could do that; do you recall that? And the comments that were made at the time. Or do you want me to read it to you?

A. I don't recall that, no, sir.

Q. You don't recall it?

A. No, sir.

Mr. Nizer: Give me 3458, please.

By Mr. Nizer:

Q. This is Mr. Sawyer asking you this question on this picture.

A. Yes, sir.

Q. Q. Now assuming that the Viking played the picture a longer time and achieved this gross under the terms offered

(3975)

by the Viking in its written bid, what would it (the Viking) have paid to the distributor for the exhibition of GUYS AND DOLLS?

Your answer:

On a sixteen-week basis, $239,400.

Mr. Rome: How many weeks, Mr. Wren?

The Witness: (You) Sixteen weeks.

A little further down:

Mr. Sawyer: I don't think we can do it in sixteen weeks. I think it would take three extra additional weeks.

Do you recall that comment by your own lawyer?

A. No, I don't sir. I do now because you have read it.

Q. And on 3459:

Mr. Sawyer: If the witness says he can do it, certainly it is his (meaning his answer). I thought—he just read 16, and I was skeptical about it, and now he says he can do it in 16 weeks.

Do you remember Mr. Sawyer's comment about that?

A. Now I do, yes, sir.

Q. Now, I want to ask you whether that skepticism hasn't caught up with you. Aren't you skeptical that you can do this in sixteen weeks that the Randolph did in fifteen, this figure you gave?

(3976)

A. No, sir.

Q. You are not?

A. No, sir.

Q. In making this comparison that you made on the blackboard on GUYS AND DOLLS you ignored the advertising, didn't you?

A. Yes, sir.

Q. Now, we have agreed, haven't we, so we need not waste time on it, that the advertising affects the film rental to a distributor very substantially, doesn't it?

A. Yes, sir.

Q. In this case, for example, the Randolph took off from the top $31,000 under its advertising clause; that is a lot of money, isn't it, that comes off a good picture? It is a substantial proposition, this advertising, isn't it?

A. Yes, sir.

Q. And you took no deduction for advertising in making your calculation?

A. Or his.

Q. What is that?

A. Or his.

Q. What is that?

A. Or his.

Q. That is right. You didn't do it on either?

A. That is right, sir.

(3977)

Q. Yes. Well, now, if I advise you that the figure of film rental that you wrote down on the board, $181,000—do you remember that figure?

A. Yes, sir.

Q. If I advise you that that is after advertising; in other words, the advertising was taken off the top—

A. Right, sir.

Q. —then in making this comparison you have already taken off the $31,000 from him, because of the way the rec-

ords were kept, you took off his advertising from the top, whereas your figure of $239,000, your estimate, has no advertising deducted, has it?

A. I will demonstrate that he took off $3100 only.

Q. $3100?

A. $3100, because by adding advertising to house expense you indicate that the exhibitor pays 10 per cent of the advertising, and I will be happy to demonstrate it to you, sir. You take your house allowance and put the advertising on top, sir, before computing film rental, and the exhibitor is paying 10 per cent of the advertising.

(3978)

Q. Well, let's do a little calculation.

A. Yes, sir.

Q. Since you say it will make you happy.

Take down these figures. I will try to do it without going to the blackboard.

You gave two calculations on the blackboard. I am going to take the second one first.

You gave the Randolph 15 weeks, $351,000. Let's keep it round figures.

A. Yes, sir.

Q. As box office.

A. Yes, sir.

Q. And you put down for 16 weeks for yourself at the Viking, at a theatre half the size, $315,000, didn't you?

A. Yes, sir.

Q. Now let's stop there for a minute. I am going to ask you how did you get $315,000. Take a look at your figures. Let Mr. Sawyer give you anything he has. Tell me how you got $315,000.

Mr. Nizer: You can help him with anything you have, Mr. Sawyer.

(A document was handed to the witness by Mr. Sawyer.)

(Mr. Nizer writes on the blackboard.)

(3979)

Q. This is GUYS AND DOLLS, Loew's. Here is the
By Mr. Nizer:
Randolph, in 15 weeks it has a box-office receipt of $351,000. Right so far?

A. I have been checking this. Go ahead, sir. I am sorry. Go right ahead.

Q. All right.

A. Fifteen weeks they got $351,000. Go ahead.

Q. Now you say you get $315,000.

A. Yes, sir.

Q. I want to ask you how you got to that figure. That is what we are going to do. Are we agreed?

A. Yes, sir.

Q. All right. Now let's start out with the first week. This is your calculation of how you get $315,000. Let's start with the first week.

A. $34,614 on this, sir, but I think there was another—all right, go ahead, $34,614.

Q. Thirty-two?

A. Thirty-two seven seventy-four—

Q. Now wait.

A. Oh, I'm sorry. You want the odd pennies.

Q. That is the first week you took. Where did you get that figure from in your calculation? How did you get that?

(3980)

A. I think I can tell you.

Q. Does it happen to be a coincidence that that is the first week of NOT AS A STRANGER?

A. No, sir.

Q. It is not a coincidence?

A. No, sir, I don't think it is STRANGER. I think it is COUNTRY GIRL.

Q. Is it?

A. I think it is. STRANGER was less than that, sir.

STRANGER was thirty-four thousand something else.

It is not COUNTRY GIRL, either.

Q. It comes out to the penny, $34,614.32. Where did you get that from?

A. No, this is just exactly $22,000 difference on this comparison here, $26,000 — $24,000 taken off, just a lump sum; $24,000 taken off the first week.

Q. Of what?

A. That is exactly $24,000 deducted from the first-week gross at the Randolph, which was $58,614.32.

Q. You took the Randolph, you are telling us — the first week at the Randolph was what?

A. $58,614.32.

Q. So what you did was just take off $20,000 to the penny?

A. $24,000.

(3981)

Q. $24,000 to the penny. You took all of this, you just duplicated, and you just took off $24,000, right?

A. Yes. But you have thirty-four. It is twenty-four.

Q. No, this is the—

A. Oh, I see, I understand. I am sorry. You have a line through there. That is the reason I—

Q. I am just trying to show you the—

A. O.K., all right, sir.

Q. You copied this from the Randolph?

A. Right, sir; took off $24,000.

Q. You assumed you would have done right to the penny, 32 cents, but you didn't assume you would have done $58,000, you assumed you would have done $24,000 less.

A. Yes, sir.

Q. How did you arrive at $24,000 less instead of $23,000 or $26,000 less? How did you get that?

A. It is an approximation near NOT AS A STRANGER, but there is another gross similar to this, sir. That is what I can't find.

Q. I don't think the stenographer can hear you.

The Witness: Did you hear that, sir?

The Reporter: Yes, sir.

By Mr. Nizer:

Q. How did you get it? Will you let me hear it? How did

(3982)

you get it? How did you decide on twenty-four?

A. I told you — I don't know.

Q. You don't know?

A. That is exactly what that amount is, $24,000.

Q. I know, but how did you get that? Why didn't you take twenty-five off or twenty-three or twenty-two? How did you get to twenty-four? Can you answer that?

A. I don't honestly remember.

Q. You don't remember?

A. No, sir.

Q. All right.

Let's take the second week that you wrote down to get to your $315,000. You remember that is what you put down here.

A. Yes, sir.

Q. I want to see how you got it. Now, you took the second week. What did you put down there to make your blackboard demonstration?

A. $32,774.

Q. And where did you get that from?

A. It is exactly $7,000 difference between that and the second week of GUYS AND DOLLS at the Randolph Theatre, which was $39,774.

Q. So what you did there was to just take off $7,000, just

(3983)

arbitrarily? You have no explanation for it, have you?

A. No, sir.

Q. And you notice that the second week at the Randolph, between the first and the second is a big drop, $19,000. That usually happens, doesn't it?

A. Surely.

Q. But in your case you only dropped $2,000?

A. Yes, sir.

Q. Why didn't you take off a little less, $6,000, $5,000, $4,000?

A. Because a gross of that size would be attained.

Q. It would be?

A. Yes, sir.

Q. But it wasn't attainable here the same as the first week, was it?

A. No, sir.

Q. What I am aiming at, so that you can follow me, is that all these figures were artificially contrived so that you would get down to the bottom, $315,000. I want to show you how you did it.

Now, what did you do for the third week?

A. Took off—

Q. What did you put down when you made this blackboard demonstration?

(3984)

A. $13,000 off of the gross of $43,555.

Q. Forty-eight cents. And the Randolph had $43,000?

A. 555.48.

Q. So once more you took 555.48 and duplicated it, but arbitrarily, without any reason that you can explain, you just took off $13,000 and not more and not less, right?

A. Yes, sir.

Q. You have no explanation as to where you got that from? You have no other explanation except you took it off?

A. Right, sir.

Q. Now, beginning with the fourth week we have the Randolph figures.

A. Right straight down, sir.

Q. And there you just copied the Randolph.

Here you didn't copy the Randolph and here you copied them, until you get down to the last week, which is the 16th week. The Randolph played 15 weeks.

A. Yes, sir.

Q. Now you are through with the Randolph, you have got nothing else?

A. Right, sir?

Q. And at this point, when you are through with the Randolph, total it up. How much did you have just combining these artificial figures with the rest of the Randolph? How much

(3985)

did you have before you got to the 16th week?

A. You were shy 7,778.21 of $315,000.

Q. In other words, you needed just an artificial figure of seventy-one—

A. Seventy-seven seventy-eight, sir.

Q. 7,778.21?

A. Yes, sir.

Q. To come out to $315,000. So you just wrote it in, didn't you?

A. Yes, sir.

Q. In other words, you did it backwards, didn't you? You found out what you needed, —

A. Yes, sir.

Q. — so you put it in?

A. Yes, sir.

Q. Now, in the case of CAINE MUTINY, Mr. Wren, —

A. Yes, sir.

Q. —you testified, didn't you, that you needed five extra weeks to equal the Randolph's box-office receipts of $237,000, didn't you? Do you recall testifying to that?

A. I may have.

Wait, sir, until I get CAINE MUTINY.

Q. Maybe I can help you out. Do you remember that 14; it would take you 14 weeks to do what they did in 9? Do you

(3986)

remember that one, 5 extra weeks?

A. Yes, sir.

Q. So that in order to make up a difference of only $237,000 you needed 5 weeks, but to make up a difference of three hundred —

A. But I explained that, how we did that, sir. We took off $5,000.

Q. But in order to make up three hundred — listen to my question.

To make up $237,000 you needed five extra weeks, but to make up $350,000 you need only one extra week. Is that what you are telling us?

A. Yes, sir.

Q. Under your offer on GUYS AND DOLLS you were committed to ten weeks, weren't you?

A. I believe that is right, yes, sir.

Q. And the Randolph played fifteen?

A. Yes, sir.

Q. And you take for your assumption sixteen, though you were only committed to ten; is that correct?

A. Yes, sir.

Q. So you are not applying the terms of your offer to this situation. You are applying a different offer than you made to Loew's on this proposition, aren't you, sir?

(3987)

A. Did we have holdover figures in our offer?

Q. You had a holdover figure from eight. That would take you to ten, but at ten it stopped.

Do you want to see it, or will you accept that?

A. And nothing for nine and ten? That's it.

Q. Past ten that is all. Nothing for nine and ten, that's right. Your counsel can check me.

A. Right, sir.

Q. Now, then, will you answer my question? Though you had an offer for only ten weeks, you have taken the computation on that blackboard as if you had a commitment for fifteen or sixteen.

A. No, sir. Just to show to attain the gross you had to have more playing time.

Q. Yes, I know. But you weren't committed to sixteen weeks.

A. No, sir.

Q. So, Mr. Wren, it is correct to say that you didn't apply the terms of your proposal to Loew's, you applied a different proposal in order to come right, didn't you?

A. Naturally, sir. It is an assumption. That is what we are talking about.

Q. Naturally. Yes, very natural.

Now let's take a look at whether you will con-

(3988)

cede another error. Under your advertising proposal of your offer — incidentally, will you agree with me that that advertising proposal in the offer of GUYS AND DOLLS is extremely complicated?

A. I don't believe so.

Q. No?

A. No, sir.

Q. Let me just show it to you.

A. Fine.

Q. It covers two whole pages of detailed suggestions and charges and divisions.

Mr. Smith: Five pages.

By Mr. Nizer:

Q. Five. You count them up. I don't want to analyze it because we haven't the time for it. Just tell me how many pages were the subdivisions you put in your proposal for advertising.

Mr. Sawyer: Will you show him Mr. Goldman's, if there is one, at the same time?

Mr. Nizer: I am not showing it to him. If you wish to you can do it later, or I will do it. It has nothing to do with what I am talking about.

Mr. Sawyer: It doesn't exist, does it?

Mr. Nizer: I don't think that —

(3989)

A. As per Mr. Ripps' suggestion you spell out what advertising means, and that is exactly what we did, sir. And there is nothing complicated about it, because right at the end it says they don't have to spend any more pre-opening and first week than 7,275.71.

By Mr. Nizer:

Q. And then there are five pages of subdivisions?

A. Second week, $1500. Third week, $1,000.

Q. No, listen; listen, Mr. Wren. Listen to me and I will save a few moments.

A. Right, sir.

Q. You have there on five pages different classifications of advertisements, some the distributor pays for, some you pay for. They can't go over a certain figur., and so on. Isn't that it?

A. No, it is not to go over. He told me to put down, spell out your advertising deal, which is exactly what we did, sir.

Q. No matter who told it to you, you don't consider an advertising offer—I am going to show this to the jury—you don't consider an advertising offer that runs for five pages with these classifications as something that is difficult to compute in advance as to how it will work out?

A. No, sir, not when I am told to do it by two representa-

(3990)

tives of Loew's.

Q. All right, very well.

I am not saying that no one asked you to put down your specifications. You are constantly telling me something that I am not challenging. That is not the point here.

In any event, whether complicated or not, have you made a calculation, since it is so simple, have you calculated the amounts for sixteen weeks of your advertising under this offer?

A. No, sir, I didn't total it.

Q. Now, if I tell you that for sixteen weeks—and I never concede that you had a right to play this picture sixteen weeks. Your own offer goes up to ten—but now following your blackboard demonstration—

A. Right, sir.

Q. —suppose I tell you that in round—well, I won't give it to you round, I will give it to you exact, $20,605. Will you, subject to checking it overnight, accept that?

A. Yes, sir, yes, sir. And $31,000 was spent, right, sir?

Q. We will come to it if you let me.

Now, assuming a $315,000 box-office gross—which is what you took by that may I call it arbitrary computation—

(3991)

A. Yes, sir.

Q. You won't object to that, will you?

A. No, sir.

Q. That is very arbitrary. All right.

Assuming that $315,000 arbitrary figure that you calculated for ten weeks now, and deducting the advertising during each week from the box-office gross, which is the deal—

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(3992)

Q. Well, wasn't this one of those situations where the advertising was to be added to the house expense?

Mr. Sawyer: All right.

The Witness: I am not sure about it. May I see it there, sir?

By Mr. Nizer:

Q. Haven't you got it in front of you?

A. No.

Mr. Sawyer: No.

By Mr. Nizer:

Q. No; well, take a look and just tell me that.

Mr. Sawyer: It is his bid. It is his bid. What he means is the Randolph bid, what the advertising deal was.

By Mr. Nizer:

Q. Let us do it this way, Mr. Wren. I withdraw it. Maybe I can—

A. No. You are right. This would be added to the house expense, meaning we are paying 10 per cent.

Q. Yes.

A. Yes, sir.

Q. And the distributor would be paying 90 per cent?

A. Yes, sir.

Q. All right. We have that.

(3993)

Now, suppose you follow me on this for a moment. When you computed the Randolph figures you did not take the advertising off the top, because apparently you didn't know about it. I will assume that it was simply due to your not being—

A. That I don't know, sir, because it is not indicated here,—

Q. Oh.

A. —so let us assume we did it.

Q. Now, let us assume that that was a perfectly innocent error. I just want to get to the correction of it.

A. Good.

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(4015)

Q. In making your comparison on the Columbia picture CAINE MUTINY you went to the COUNTRY GIRL, which was a Paramount picture which played at another theater and you compared those two. Do you recall that technique on the blackboard?

(4016)

A. I believe we said that, yes, sir.

Q. Now, when you made your comparison, however, of GUYS AND DOLLS, you did not apply the same comparison of COUNTRY GIRL, this outstanding picture; you did not use COUNTRY GIRL to make your comparison.

A. No, sir.

Q. Did you?

A. No, sir.

Q. And if you had used the same standard for GUYS AND DOLLS which you had used on the prior picture CAINE MUTINY, and you had taken the COUNTRY GIRL

receipts, as you did in the other case, your conclusion of the film rental that Viking would have paid, under your theory of assuming, the box office gross at the Viking would have been about $50,000 less than what your calculation showed the Viking would have paid under your calculation. Will you accept that, subject to check, of applying those terms to COUNTRY GIRL?

A. Yes, because of the difference in gross.

Q. What is that?

A. Because of the difference in gross.

Q. Yes.

A. On the two arbitrary plans, yes, sir.

Q. In other words, you would have had, if you would have applied the COUNTRY GIRL, as you did in the other case—you

(4017)

would have had a $50,000 less film rental at the Viking than the Randolph paid; correct? Subject to your checking that is.

A. Yes, sir, subject to our checking.

Q. All right. So therefore you didn't use COUNTRY GIRL, it wouldn't have come out right, would it, for your demonstration?

A. No, sir.

Q. No. It wouldn't have come out right.

A. (No response.)

Q. GUYS AND DOLLS had a national film rental of six eight, right?

A. I will accept that, sir.

Q. And NOT AS A STRANGER, which played at your own theater, is six one; six million one, national film rental.

A. Yes, sir.

Q. Now, if you had used your own experience, instead of traveling around, if you had taken your own experience on NOT AS A STRANGER, instead of going some place else, at the Viking Theatre, and even if you had assumed

that you would have played sixteen weeks of GUYS AND DOLLS, though your commitment was ten, you would have come out with about $80,000—I will give you the exact figures subject to check; I will give it to you, $77,983; and subtract that, will you, please, from $181,000 which the Randolph paid, and your demonstration would have defeated you by how much money?

(4018)

A. $113,000.

Q. Yes.

A. There is a balance here—

Q. What is that?

A. I say a difference here of $113,000.

Q. That is right. That demonstrates that had you used NOT AS A STRANGER, which is the closest comparable picture you have on national film rental—had you used that for your receipts and checked your own film rental, own film terms against it, you would have come out on the wrong side of your demonstration by a large sum, wouldn't you, if you had done that?

A. Yes, sir.

Q. All right. Now let us go to TEA AND SYMPATHY, sir.

• • •

(4019)

Q. Mr. Steinberg has given you the Viking offer and the Goldman offer he tells me.

A. Yes, sir.

Q. All right. Now, just looking at the Viking first, what was the playing time that you offered to run on that?

(4020)

A. A minimum of four weeks to start approximately on availability, which you advise is approximately September 26, 27, and 28, nineteen—

Q. So it was four weeks?

A. Yes, sir.

Q. There is no holdover?

A. No, other than the indication on any additional days what the terms will be.

Q. All right.

A. None whatsoever.

Q. Four weeks?

A. Yes, sir.

• • •

(4022)

Q. Under both offers, but particularly with respect to the comparison yo made on the blackboard you offered four weeks, is that correct?

A. We offered in the bid four weeks, yes, sir.

Q. Now, the Randolph offered an indefinite run, didn't it?

A. Yes, sir.

Q. And not only an indefinite run, but that the termination was solely in the discretion of the distributor.

A. Left solely to the discretion of the distributor, right, sir.

Q. So that there isn't any doubt at all in your mind, is there, that the term of the Randolph offer is a better one from the distributor's viewpoint than yours?

A. As it applies to the run.

Q. As it applies to the run?

A. Yes, sir.

(4023)

Q. I am talking about the term of running time.

A. Yes, sir.

Q. Now, actually the Randolph did play this picture how many weeks, TEA AND SYMPATHY?

A. Five weeks and three days, sir.

Q. Five weeks and three days?

A. Yes, sir.

Q. So that would be a week and three days longer than your commitment, would it not?

A. Yes, sir.

Q. But when you made your comparisons on the board you ignored that week and three days and assumed that you could do in your four weeks, not only what the Randolph did, but you assumed that you could do in four weeks what the Randolph did in five weeks and four days, didn't you, for the purposes of your comparison I mean.

A. No, we took the whole period of time, five weeks and three days.

Q. Well, that is what I am saying.

A. Well, I misunderstood you, sir, I am sorry.

Q. I will say it again, ask you again. When you made your comparison on the blackboard you not only took the entire gross of the Randolph, which is—

A. Yes, sir.

(4024)

Q. —twice your size, and assumed that you would have done it in your theatre—

A. Right, sir.

Q. —but you also ignored the difference of one week and four days in your commitment and assumed that you could do in four weeks what the larger Randolph Theatre would do in five weeks and four days, for the purpose of that comparison I mean.

A. No, we didn't sir, I told you in the comparison, which was arbitrary, we took all the playing time into consideration.

(4025)

Q. I don't think that is an answer to my question.

A. We took the four weeks—five weeks and three days gross.

Q. Yes. And applied it to an offer that you had made for four weeks, isn't that so?

A. At the terms of that offer, yes, sir.

Q. Yes, the terms. I am not talking about terms. I am talking about playing time, that term. Can't we agree that for the purpose of your comparison, your demonstration on the blackboard, you assumed that your offer which you applied in the term of playing time, which is four weeks would do the same as the Randolph in five weeks and four days?

A. No, sir. The way we did it, sir, was this: We estimate the first two weeks at 50 per cent, 40 to 50 per cent on the third week, 35 to 50 on the fourth week and 25 to 50 on the additional days.

Q. I know all about that. That is the sliding scale. Now will you come back to where I am?

A. That is the way we computed it.

Q. I know that is how you computed it. You applied the terms—

A. All five weeks and three days, not four weeks, sir.

Q. I will try again, sir. You had a commitment on this

(4026)

picture for four weeks only?

A. Yes, sir.

Q. Not five weeks, not six, not five-four. Your total commitment was four weeks.

A. Yes, sir.

Q. And when Loew's was considering these two proposals they had an indefinite run, which might be 10 or 15 or 20 weeks, that turned out to be five weeks and four days.

A. Right, sir.

Q. But so far as you are concerned, the most it could be, even if the picture were exceedingly successful, so far as your commitment was concerned it was four weeks.

A. Playing time.

Q. Playing time?

A. Yes, sir.

Q. Now, when you made your comparison on the board, looking by hindsight at what had happened, you had five weeks and four days of receipts at the Randolph Theatre, didn't you?

A. Yes, sir.

Q. And for the purpose of that comparison you took the entire receipts of the Randolph for the five weeks and four days and attributed it as income to the Viking.

A. Yes, sir.

(4027)

Q. Even though the Viking had a commitment of four weeks, isn't that so?

A. Yes, sir.

Q. All right, that is what I wanted to know.

Now, if we made a reconciliation of the difference in playing time—assume this with me as a proper way to do it—assume that we reconciled the difference between four weeks and five weeks and four days—or let me call it six weeks for even purposes, will you, Mr. Wren, make that little smoothing out? Let's call it six weeks so I don't have to say five weeks and four days each time.

A. All right, sir.

Mr. Sawyer: Or five.

Mr. Nizer: What?

Mr. Sawyer: Or call it five.

By Mr. Nizer:

Q. Either way. If you reconcile the difference on the receipts of the Randolph, even assuming that you would have done exactly what the Randolph did for that time, this theatre twice your size—

A. Yes, sir.

Q. —if you made a reconciliation, allowing for that difference in playing time under your offer, your commitment, the figure would come down to roughly $28,000 instead of

(4028)

$38,000, as you calculated, would it not?

Will you take that at least subject to a check?

A. Yes, sir, subject to check.

Q. All right. Now, you also—

A. Well, you are right, because a quarter of—25 per cent of 8,000 is 2,000, so you are right. It is 28,000.

Q. All right, thank you. We don't have to check it.

Now, the advertising figure which you applied was also wrong. I don't mean to say deliberately, but it was wrong, wasn't it? You took off from the Randolph $6,280. Do you see what you did in your computation? Do you see that?

A. Yes, sir.

Q. Less advertising, $6,280.

A. Yes, sir.

Q. And for the plaintiff you only subtracted $2,753 instead of $6,000, didn't you? That is an inadvertent error, I take it, is it not?

A. No. Now wait a minute, please, sir. Under our bid: "The exhibitor to place and pay only for the entire cost of the following advertising"—

You are right, it is a mistake, sir.

Q. Yes. Now, Mr. Wren, without even calculating that

(4029)

mistake, which as I say could very well be just an innocent error of mathematics—but cutting through it, that error together with the adjustment, the reconciliation of playing time, would bring your demonstration into the reverse gear, wouldn't it? Instead of showing that you would have

paid more money, you would have paid less, isn't that so, without going into the exact computation of it?

A. I couldn't have paid less than a $27,500 guarantee, sir.

Q. Yes, but even with that, the receipts, the film rental of the Randolph, was how much?

A. $27,588.06.

Q. So if you limited yourself to the guarantee of twenty-seven five, the Randolph would have paid slightly more film rental; not much, $588.

A. Yes, but limiting—we have $28,000 worth of—I understand what you mean. $28,000 on the four weeks.

Q. Is that correct, sir?

A. Right. You are right, sir.

Q. So it would defeat the entire demonstration, because you would have paid less film rental. Not by much according to your calculation, but it would have been less, not more? Will you agree on that without going into the figures?

A. It would be probably the same, sir.

(4029a)

Q. All right. Now, in view of those—withdrawn.

Now, in addition to that, Mr. Wren, you would have—withdrawn again.

Your own experience had been with a picture called THE PRODIGAL, which was also a Loew's picture, wasn't it?

A. Yes, sir.

Q. And that picture was $2,181,000 national film rental, right?

A. Right, sir.

(4030)

Q. And TEA AND SYMPATHY is $2,139,000. They are almost identical. You couldn't get them closer, could you? Two million one three, two million one eight.

A. Yes, sir, I am listening.

Q. And if you had gone to your own experience at your own Viking Theatre, instead of assuming that you would have done the Randolph box office receipts with its two box office intakes and its larger theater and larger lobby—

A. We have two box offices, sir.

Q. Oh, good. All right. I didn't know.

If you had gone over not to the Randolph but stayed at home at the Viking and looked at your own experience, the total film rental, applying your offer on TEA AND SYMPATHY, the picture we are talking about, applied to the PRODIGAL results which played in your own theater, the same identical national film rental, would have brought you beneath your guarantee of $27,500, isn't that so? Will you accept that subject to check?

A. I can check that fast.

Q. All right, then check it now if you want to. If you can do it fast, let's do it now.

I will tell you what it comes out to. $25,504. See if that checks with you.

A. Yes, sir.

(4031)

Q. O.K. So there again if you applied your own experience, this demonstration would have been reversed. You would have paid out the same, slightly less, but it wouldn't have been more than your demonstration tried to show, correct?

A. No, sir.

Q. You mean I am correct, when you say "No, sir?"

A. Yes, we would have paid the $27,500.

Q. I mean you agree with me? I say, you agree with me? The "No, sir" I think was confusing in view of my question. You agree with what I said?

A. May I hear it again? I think I do, but I want to hear it again.

Q. I say that if you had taken your own experience on the PRODIGAL, another Loew's picture, with the identical national film rental, and applied the terms of TEA AND SYMPATHY to your own experience instead of going over to the Randolph, your demonstration would have come out so that there was no difference, or a slight difference in favor of the Randolph under your own computation.

A. No.

Q. Correct?

A. No, because you see now you want me to reduce the playing time of the PRODIGAL.

Q. No, no. I am not asking you to reduce the PRODIGAL.

(4032)

Mr. Sawyer: Yes.

A. Certainly.

By Mr. Nizer:

Q. Now, how long did you play PRODIGAL?

A. Six weeks and one day.

Q. All right. Would you make the reconciliation in the same way and see if it still doesn't come out?

On the PRODIGAL you were committed to six weeks, weren't you?

A. I don't contest that, but I say—

Q. I don't say you do. I am asking you a question.

A. In one place you want me to take five weeks and now you want me to take six.

Q. No, I don't. I say you were committed. I asked the question.

A. Yes, sir, I was committed.

Q. All right. Do you want to make that reconciliation now or over the week end and then tell us?

A. Over the week end, definitely, sir.

Q. So we won't waste time. All right.

A. Do you want me to take PRODIGAL on a four-week basis, sir?

Q. Yes—no—yes, that's right, on a four-week basis.

A. On a four-week basis.

Q. That's right. You do that.

(4033)

A. Right, sir.

Q. Now, sir, how long was the playing time for one show of NOT AS A STRANGER? How many minutes did it take to show that?

A. Two hours and 15 minutes.

Q. And that includes a short and a newsreel in it, I suppose?

A. No, sir.

Q. Without that?

A. The feature.

Q. With the short—

A. That was the feature itself. Plus a short, I think that was seven minutes. Two hours and 22 minutes.

Q. Two hours and 22 minutes.

A. I am not sure about the short. The feature itself ran two hours and 15 minutes, sir.

Q. All right. And with the short you say—did you have shorts?

A. Maybe it ran 2:25 with the trailer.

Q. Yes. Did you have shorts with that show?

A. That is what I am going to check, sir. I am not certain.

Q. Oh, you don't know.

Now, how long was the showing time of WAR AND PEACE?

A. Three hours and 28 minutes.

Q. And there also was in addition to that a 12-minute

(4034)

intermission with that picture as it was played?

A. I know there was an intermission. I am not sure how long, sir.

Yes, there was an intermission.

Q. Yes. So that would be roughly three hours and 40 minutes.

That would be three hours and 40 minutes, would it not?

A. Yes, sir.

Q. So that if you had played WAR AND PEACE, the running time of each show would have been an hour and 15 minutes longer than NOT AS A STRANGER?

A. Yes, sir.

Q. Now, you told us that NOT AS A STRANGER you opened up at 8:30 in the morning?

A. Yes, sir.

Q. How many shows a day did you run NOT AS A STRANGER?

A. I believe it figures out to six or seven shows, sir.

Six shows a day, sir.

No, seven.

Q. Seven shows a day. And how many less shows would you have had if you had played WAR AND PEACE, and assuming that you opened up also at the same time, 8:30 in the morning? Make it identical. How many less shows would you have had?

A. Just about half of that, sir.

(4035)

Q. Half. And of course these are—

Mr. Sawyer: Well, that is just simple mathematics. The witness is tired. Let's give him a figure on that. It couldn't possibly be so.

By Mr. Nizer:

Q. What would it be, longer than that?

A. We would have three shows a day on a 12-hour operation.

Q. What is that?

A. Approximately three shows a day on a 12-hour operation.

Q. Well, Mr. Sawyer is objecting. I don't know.

Mr. Nizer: If you want to correct him, Mr Sawyer—

Mr. Sawyer: Well, one—

Mr. Nizer: I think it is right.

By Mr. Nizer:

Q. Isn't that correct?

A. Three shows a day on a 12-hour operation, yes.

Q. All right. Instead of seven shows.

A. Yes, sir.

Q. Now, these are facts, of course, which any distributor would know, would he not? He knows that when he has a very long playing picture he has less shows per day with that very long time picture? This is one of these situations which you have to face as a fact of life and possibly income, isn't that

(4036)

so?

A. Certainly.

Q. And if the theater has let's say 3000 seats rather than 1000 seats, and assuming a very great attraction—this is a $13 million picture. I think we went over that once. Anyhow, it is a very huge investment and a very large picture—no, I don't think it was thirteen. That was COMMANDMENTS. It is less than that, but a very large picture.

Assuming, therefore, a flood at the box office, everybody wants to see this outstanding picture—I think it was Audrey Hepburn who was in it, Jose Ferrer and many others.

A. We read a letter on it, remember?

Q. That's right. That letter told you how great it was.

A. Yes, sir.

Q. Incidentally, it turned out to be a great disappointment, didn't it?

A. I wanted to play the letter.

Q. Yes.

A. Yes, sir.

Q. That would have been better than the picture.

A. Yes, sir.

Q. It turned out to be a great disappointment, a great loss, didn't it,—

A. Yes, sir.

(4037)

Q. —to everybody, the distributor, the exhibitors who played it. This is one of the vagaries again of the business?

A. Right, sir.

Q. This was supposed to be an outstanding attraction and it was really not good box office, was it?

A. Yes, sir.

Q. This was the picture you complained you lost.

Now, in anticipation, before the picture played, do you not think it is reasonable on the part of a distributor when he has an attraction which because of its length, but he assumes it is an outstanding picture and will crowd them in, as the phrase is in the industry, is it not a reasonable consideration to say in that kind of a case, even if you disagree in any other, that the size of a theater, the larger size of a theater, is an advantage?

Wouldn't you say that is a reasonable way to go about it for a distributor?

A. Well, he did go about it that way and he advised me—

Q. No, no, don't tell me.

A. —that my theater was one of the four suitable for this.

Q. Yes. And that was a very nice break, wasn't it?

What I am asking you now is whether as between your theater and a theater twice your size it isn't an advantage, peculiarly because of the long playing time of this

(4038)

picture, which we have been over, and the lesser number of shows, so that you can't have such a turnover—you have got three shows or four shows instead of seven—to have a larger seating capacity to accommodate the flood of people you expect for this picture?

A. Not necessarily so.

Q. I don't say—

A. And I can explain why.

Q. Well, before you explain why I would like an answer, and I am not asking whether is is necessary. I am not even asking if you agree.

You have never been a distributor, have you?

A. I have said that several times, sir.

Q. Therefore, all I am asking is will you at least acknowledge that that is a reasonable honest difference of opinion that somebody in the distribution department can have with your judgment on that?

A. No, sir, because your client don't agree with you. He told me my theater was suitable in that letter we read.

Q. I am not asking whether your theater was suitable. I am asking you whether if there is an advantage, even if your theater is suitable, but if another theater is available that is just as suitable and that has twice the seating capacity, whether reasonable men cannot at least differ that that is an

(4039)

advantage from a distribution viewpoint on a picture like WAR AND PEACE. That is my question.

A. Reasonable men do differ.

Q. And you would not ascribe a dishonest motive to a distributor who says, "Even if the bids that came in are comparable, almost even, or they tip a little one way or the other, I will take my chance on the theater that has twice as many seats than the other fellow's bid." You wouldn't

ascribe a dishonest motive to such a determination, would you?

A. Not if he determined some other things with that.

Q. I say you would not. You answer is you would not, would you?

A. No sir, not on that particular basis, seats alone, no, sir.

Q. Now, this is the situation where you will recall—and I don't want to review it all—that you wanted to screen this picture where there was no print here. It had been made in Rome, remember those letters? And you made a conditional proposal, "I will submit an offer if you let me withdraw it after I seen it."

Do you remember all that?

A. Yes, I remember it perfectly, sir.

Q. Do you also recall that you testified that due to your refusal to submit an offer until you could screen it, though

(4039a)

nobody else in Philadelphia had screened it or could screen it—remember the executives of Paramount had to fly over to Rome to see it—do you recall testifying that you were late in submitting an offer because you didn't want to submit one by the date—remember we had all those telegrams—

A. Yes, sir.

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(4041)

TWENTY-FOURTH DAY

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